TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 639

L. J. BLAKEY (SUCCESSOR TO R. E. SCHUMACHER), RECEIVER OF THE FIRST NATIONAL BANK OF NEW BERN, NEW BERN, NORTH CAROLINA, PETITIONER,

vs.

CHARLES J. BRINSON, ~~RECEIVER~~

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 16, 1932

CERTIORARI GRANTED FEBRUARY 23, 1932

(36,453)

(36,453)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 4, 1932

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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NORTH CAROLINA, AT NEW BERN

CHARLES J. BRINSON

vs.

THE FIRST NATIONAL BANK OF NEW BERN, R. E. SCHUMACHER, Receiver

STIPULATION OF COUNSEL AS TO PRINTING TRANSCRIPT OF RECORD—Filed April 27, 1931

It is hereby stipulated and agreed by counsel for all parties to this cause that only the following parts of the transcript of the record herein shall be printed, viz.:

The bill of complaint;

The answer;

Memorandum showing issuance of process, motion for removal from Superior Court of Craven County, to this Court, and filing in this court of transcript;

The bill of exceptions, as settled;

The decree of the Court;

The assignment of errors;

Clerk's certificate;

This stipulation.

It is agreed that the record shall be printed under the supervision of the Clerk of the Circuit Court of Appeals [fol. 2] of the Fourth Circuit, and we agree to be governed by the provisions of rule 23 of that court.

This April 24th, 1931.

Moore & Dunn, Counsel for Complainant. J. O. Carr & J. F. Duncan, Counsel for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM AS TO PROCESS, ETC.

1. Summons issued out of the Superior Court of Craven County, North Carolina, March 19, 1930;

Served on defendant, receiver, with copy of the complaint, March 21, 1930; 30 days for answer from service date;

2. Petition and motion for Removal to United States Court, filed March 29, 1930; removal order March 31, 1930; Transcript of record filed in United States District Court at New Bern, N. C., April 2, 1930;

[fol. 3] 3. By consent order of 24 day of April, 1930, time to plead extended to May 30, 1930;

By consent order May 28, 1930, time to plead extended thirty (30) days from May 30, 1930.

4. Answer filed June 26, 1930.

S. A. Ashe, Clerk, by Geo. Green, Deputy Clerk.

IN SUPREME COURT OF CRAVEN COUNTY

CHARLES J. BRINSON

VS.

THE FIRST NATIONAL BANK OF NEW BERN, R. E. SCHUMACHER, Receiver

COMPLAINT

The plaintiff, complaining of the defendants, says:

1. That the First National Bank of New Bern is a corporation duly organized and existing under the laws of the United States and at the times hereinafter set forth, was conducting a general banking business in the City of New Bern, North Carolina; and the plaintiff is a citizen and resident of Craven County, said State.

2. That on or about the — day of October, 1929, the said The First National Bank closed its doors and was put in liquidation under the laws of the United States, and R. E. Schumacher was duly appointed as Receiver of the aforesaid banking institution by the Comptroller of Currency, and as such Receiver has been engaged and is now engaged [fol. 4] in liquidating the affairs of the aforesaid bank, as this plaintiff is informed and believes.

3. That the said The First National Bank of New Bern as a part of its duties as a general banking institution under the laws of the United States government, undertook from time to time through its officers and agents, to purchase for and deliver to sundry parties who might apply therefor, United States government bonds in such amounts and denominations as might be requested by its customers, and had prior to the times hereinafter set forth so purchased bonds for and delivered the same to this plaintiff.

4. That some time prior to the fourteenth day of October, 1929, this plaintiff advised the aforesaid The First National Bank of New Bern that he desired to purchase four thousand dollars in value of Registered United States Fourth Liberty Loan 4¼% bonds, and the aforesaid bank, through its officers and agents, contracted and agreed to buy such bonds as this plaintiff might require for the plaintiff and deliver the same to him in return for a sum of money for which this defendant then and there agreed to pay for said bonds.

5. That on the fourteenth day of October, 1929, this plaintiff was advised by the aforesaid bank that he could then buy the Registered bonds desired by him without having to pay accrued interest thereon, and this plaintiff delivered to the aforesaid bank the sum of Thirty-nine Hundred and Sixty-four and 60/100 Dollars, ($3964.60) which he was then and there advised was the amount of the cost of said bonds including the interest and commissions thereon for the special purpose of purchasing four thousand dollars in Fourth Liberty Loan 4¼% bonds, as hereinbefore set forth, for this plaintiff, with explicit directions to remit the same to the United States Treasury for the purchase of Registered bonds as aforesaid.

6. That thereafter, to wit: on the nineteenth day of October, 1929, this plaintiff was informed that the bonds theretofore ordered by him had been purchased with the funds aforesaid so designated and directed to be used for such [fol. 5] purpose at a cost of Thirty-nine Hundred and Sixty-four and 60/100 ($3964.60) Dollars, as follows, to wit:

Four Thousand Dollars in Fourth Liberty Loan 4¼% Bonds	$3,960.00
Accrued Interest	.60
Commissions	4.00
Total	$3,964.60

Which said sum of money theretofore placed in the Bank for this special purpose had been applied to such purchase, giving to this plaintiff a statement of said purchase approved by the Cashier of said Bank, but failing and neglecting to deliver to this plaintiff the bonds reported to have been purchased for him.

7. That since the closing of the aforesaid Bank this plaintiff is informed and believes that the aforesaid sum of Thirty-nine hundred and Sixty-four and 60/100 ($3964.60) Dollars, so specially placed in the Bank aforesaid for the purposes as hereinbefore set out, had not been so utilized and the aforesaid Bank wrongfully and unlawfully took and converted the moneys belonging to this plaintiff and placed in said Bank for the special purpose aforesaid, and carried the same to the general cash in the aforesaid Bank and failed and neglected to remit the same or purchase the bonds for this plaintiff as directed.

8. That this plaintiff has demanded of the aforesaid defendant and R. E. Schumacher, Receiver, the return to him of the aforesaid sum of Thirty-nine Hundred and Sixty-four and 60/100 ($3964.60) Dollars so wrongfully and unlawfully misapplied, misappropriated and converted by the defendants, which demand has been refused.

9. That this plaintiff is informed and believes that the defendant has wrongfully and unlawfully commingled the funds belonging to this plaintiff and so placed in the defendant Bank for the purposes aforesaid, with other funds in said Bank, and has wrongfully and unlawfully refused to [fol. 6] deliver the same to this plaintiff, and the said Receiver, wrongfully and unlawfully, continues to refuse to pay over to this plaintiff the moneys and properties lawfully belonging to him.

10. That this plaintiff is informed and believes that the moneys of this plaintiff so placed in said Bank and in the

hands of its officers for the purpose aforesaid, increased and enhanced the value of the assets coming into the hands of the Receiver of the aforesaid Bank to the full amount thereof, and that from and after the date aforesaid to the date of closing of the doors of the said banking institution and the appointment of the Receiver as hereinbefore set out, the aforesaid Bank at all times had sufficient cash on hand and in the bank to pay the aforesaid trust fund so held by it for this plaintiff, and that the funds coming into the hands of the defendant-receiver was impressed with the trust in favor of this plaintiff, and that at all times after the aforesaid trust fund was received by the defendant bank, it had cash on hand to the full amount of the fund herein so wrongfully converted, misapplied and misappropriated by it and held by it in trust for this plaintiff for the purposes hereinbefore fully set fourth.

11. That this plaintiff is informed and believes that the officers of the aforesaid Bank, to wit: W. J. Caroon, Vice-President and Cashier, so taking and receiving the funds of this plaintiff and wrongfully converting, commingling and misapplying the same, were under bond for the due and faithful discharge of their duties as such officers of the Bank aforesaid and this plaintiff has demanded of the Receiver that he disclose the nature of the aforesaid bond and declare the forfeiture thereof to the extent of the amount of the misapplication, as hereinbefore set out, to the end that this plaintiff might make such surety a party hereto, if entitled in law so to do, and the defendant-Receiver might be protected in the payment of the money belonging to this plaintiff as aforesaid, but the aforesaid Receiver has refused to give this plaintiff any information as to the terms of the aforesaid bond or security or the protection which the defendant-Bank had thereunder, or of the amount thereof, or any other information concerning the same ex-
[fol. 7] cept the aforesaid Receiver has informed this plaintiff that said Bank had a bond with a Surety Company for the protection of said Bank against any misconduct of its officers.

Wherefore the plaintiff demands judgment against the defendants:

1. For the sum of Thirty-nine Hundred and Sixty-four and 60/100 ($3964.60) Dollars so wrongfully taken, misappropriated, misapplied and converted by the defendant Bank.

2. That the aforesaid sum be declared to be a trust fund in the hands of said Bank coming into the hands of said Receiver, and said Receiver be directed to pay over the aforesaid sum together with interest thereon as a prior lien and claim for the benefit of the plaintiff out of any funds that have come into his hands as Receiver of said Bank.

3. That the said sum of Thirty-nine Hundred and Sixty-four and 60/100 ($3964.60) Dollars be declared to be a Special Deposit in trust in the aforesaid Bank.

4. For the costs of this action, and for such other and further relief as the plaintiff may be entitled.

H. P. Whitehurst, Moore & Dunn, Attorneys for the Plaintiff.

Duly sworn to by Charles J. Brinson. Jurat omitted in printing.

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER

Defendant, for answer to the complaint herein, says:

1. Paragraph one of the complaint is admitted;

2. Paragraph two of the complaint is not denied;

3. As to paragraph three of the complaint defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies same: but, it is not denied that said Bank bought bonds, from time to time, for its own account and occasionally for its customers as an accom-odation to them but not as a part of either its duties or obligations imposed by law;

4. As to paragraph four of the complaint defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies same;

5. As to paragraph five of the complaint defendant has [fol. 9] no knowledge or information thereof sufficient to form a belief, and therefore denies same;

6. As to paragraph six of the complaint defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies same;

7. As to paragraph seven of the complaint defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies same;

8. Answering paragraph eight of the complaint defendant admits that plaintiff has demanded of him payment of deposit and that said demand has been refused; all other parts of said paragraph eight are denied. And, it is particularly denied that plaintiff is entitled to such payment as a preference over other depositors in said Bank;

9. Paragraph nine of the complaint is denied;

10. Paragraph ten of the complaint is denied;

11. Answering paragraph eleven of the complaint it is not denied that the First National Bank of New Bern had a bond (denominated "blanket bond") securing said Bank against the misconduct of its officers, of which W. J. Caroon was one, and that defendant informed plaintiff of this fact: Except as admitted paragraph eleven is denied.

And, this defendant has no record or other information of any such bond as indicated by plaintiff, but he is ready, willing and anxious, and will diligently undertake, to avail this Trust of any benefit which may be obtained from such information as plaintiff alleges he has, if furnished this defendant in due form: and defendant asks the Court that plaintiff be required to submit such information that defendant may investigate same and take proper action thereon in the interest of plaintiff and other depositors of said Bank.

Whereupon defendant prays that this action be dismissed, at plaintiff's cost; and that plaintiff be left to his

[fol. 10] remedy of proving his claim as other creditors may prove; for general relief in this premises.

J. O. Carr, J. F. Duncan, Solicitors for Defendant.

Duly sworn to by R. E. Schumacher. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions

(Style of court and title omitted)

This cause came on for hearing before the Honorable I. M. Meekins, Judge, Special Term 1930 December, to-wit December 29, 1930, when the following proceedings were had, viz:

CHAS J. BRINSON, complainant, being duly sworn, testified as follows: Sixty six years of age. In October 1929 had money on deposit in First National Bank of New Bern; had done business there thirty years. On October 14, 1929, I drew a check on Eastern Bank & Trust Company for $2100 and deposited it in First National Bank, to finish covering $4000 to buy bonds. Mr. Caroon made all those entries from 14th down and thru those up there (exhibiting witnesses bank book of account kept in First National [fol. 11] Bank. Prior to drawing the check on Eastern Bank & Trust Company I had conversation with Mr. Caroon about purchasing bonds. He had been talking about getting these bonds for four or five months; they were above par until October and I didn't want to pay accrued interest, and first of October they went off a little and on 10th I told him it was time to get those bonds; and he told me to bring the rest of the money there on the 14th of October and he says: "we will send to Richmond to the Federal Reserve Bank, and if they haven't got them, they can send to New York and have them registered in Washington City and you will get them in twelve or fifteen days, and we will hear from them in four or five days. I gave him the $3964.60 and he gave me that receipt (exhibited). It is in Mr. Caroon's handwriting. Then on 15th there was a Gov-

ernment check they sent me for interest on $6000 bonds, $127.50, he entered up next day.

Charge slip, dated October 19, 1929, offered, and marked "P—Ex. 1".

Entry on Bank Book offered, marked "P—Ex. 2," showing $3964.60 was withdrawn from the general deposit October 19th.

P. Ex. 1

The National Bank of New Bern

66-61. New Bern, N. C., Oct. 19, 1929.

This is to advise you that we have this day charged your account as follows:

4,000 Fourth L. L. 4¼% Bonds	3,960.00
Acc. Int.	.60
Commission	4.00
	3,964.60

To Chas. J. Brinson. Address: Savings Account.

Approved by W. J. C., Cashier.

[fol. 12] P. Ex. 2

Date	Checks	Deposits	Interest	Balance
Jan. 1, 1929			28.37	2,866.01
Apr. 1,			28.66	2,894.67
Apr. 10,		5,000.00		7,894.67
Apr. 18,	5,972.00			1,922.67
Jul. 1,			19.22	1,941.89
Oct. 1,			19.42	1,961.31
Oct. 14,		2,100.00		4,061.31
Oct. 15,		127.50		4,188.81
Oct. 21,	3,964.60			224.21
Oct. 25,			.09	224.30

After talking with Mr. Caroon I took $2100 out on my account in Eastern Bank & Trust Company and carried it

to First National Bank; Mr. Caroon told me to bring it on 14th to make up balance of $3900 odd dollars, to buy bonds. I put money there for express purpose of buying bonds; we had talked about it for four or five months. Next day after I deposited that check I asked him if he got that letter off promptly, and he said "yes", it went off on the evening's mail; you will get them in fifteen days. Then on 19th I asked him, and he said: "I have your bonds; come over to the office" and he gave me that slip, and said: "you will get them in eight or ten days now."

After Mr. Schumacher came, the day he took the Bank over I went to Bank; was introduced to Mr. Motter, the Examiner; I showed the slip to him and asked him if my bonds were there; he called Mr. Carron and said: "Mr. Brinson has an account for some bonds, have you these bonds", and he said "No"; and he said: "Did you order them"; and he said "No", sir; he said: Did you collect this money"; he said: "I did"; He said, "What did you do with it"? He said "I charged it off on the cash sheet". This was after bank closed. Mr. Motter carried me in the office; showed slip to Mr. Schumacher; he said he had just taken the bank over and would have to have time on it. I went to Mr. Schumacher several times; got no satisfaction; he said the Comptroller said it should go like the deposits; I wasn't willing to that; I have about $1000 on deposit, checking account; done all my checking business, [fol. 13] for over 35 years or more, with that bank. Mr. Caroon told me on 19th he had the bonds, and gave me that receipt. The day the Bank closed I told Mr. Bland I had receipt for the bonds; next day was Sunday. Monday night I called up Mr. Caroon; asked him if those bonds had come; he said "No" "but he would do all he could for me about them". I found, after a week, that no bonds had been registered in Washington since the 15th.

Cross-examination:

On October 19th he said, when slip was given me, "there is your receipt and you will get your bonds in eight or ten days". I talked with Mr. Caroon Monday, after the Bank closed Saturday. I never got any bonds. Don't know that the money ever went out of the bank.

Redirect examination:

Ordered Fourth Liberty Loan bonds 4¼%, registered.

Plaintiff offers slip (to show this money had been transferred to Bond account in First National Bank; exhibit 3.

Also offers Bank's Ledger Sheet called "Bond account" calling attention to date October 21, 1929; exhibit 4.

Also offers "Daily Statement of the Condition of the Bank October 12th, 1929 up to and including October 25th 1929, showing, "cash on hand", "due from Banks" Exhibited 5.

P. Ex. 3

The First National Bank

Deposited by —— ——.
Bond A/C.

New Bern, N. C., 10/21, 1929.

In receiving items for deposit or collection, this Bank acts only as depositor's collecting agent and assumes no [fol. 14] responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This Bank will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This Bank or its correspondents may send items, directly or indirectly, to any bank including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge back any item at any time before final payment, whether returned or not, also any item drawn on this Bank not good at close of business on day deposited.

	Dollars	Cents
Currency		
Silver		
Gold		
Checks, Bonds		
Chas. J. Brinson	3964	60

P. Ex. 4

Bond Account—Bank's Ledger Sheet

Date	Checks		Deposits	Balance
Jan. 29, 1927	.....	.....	14,500.00	14,500.00
Jan. 31, 1927	.....	.....	419.47	14,919.47
Feb. 1, 1927	4,186.55	.....	.....	10,732.92
Feb. 1, 1927	2,000.00	.....	.....	8,732.92
Feb. 3, 1927	154.76	10,671.36	2,093.20	.00
June 29, 1927	.....	.....	18,000.00	18,000.00
July 1, 1927	15,000.00	.....	.....	3,000.00
July 1, 1927	3,000.00	.....	.....	.00
Jan. 21, 1928	.....	.....	2,846.91	2,846.91
Jan. 24, 1928	.....	.....	10,086.22	12,933.13
Feb. 4, 1928	2,846.91	.....	.....	10,086.22
Feb. 7, 1928	10,086.22	.....	.....	.00
Mar. 27, 1929	.....	.....	5,546.73	5,546.73
Mar. 30, 1929	5,546.73	.....	.....	.00
Aug. 8, 1929	.....	.....	4,016.80	4,016.80
Aug. 20, 1929	.....	.....	10,065.00	.....
.....	.....	.....	3,015.67	17,097.47
Aug. 23, 1929	28.50	.....	.....	17,068.97
Sept. 9, 1929	502.80	.....	.....	16,566.17
Sept. 26, 1929	1,004.00	.....	.....	15,562.17
Sept. 28, 1929	.....	.....	504.15	16,066.32
Sept. 30, 1929	10,065.00	.....	.....	6,001.32
Oct. 17, 1929	.....	.....	991.00	6,992.32
Oct. 21, 1929	.....	.....	3,964.60	10,956.92

[fol. 15] "The plaintiff offered in evidence the Daily Statement of the Condition of the Bank October 12, 1929 up to and including October 25, 1929, for the purpose of showing the cash on hand and due from banks, as shown on said statements, as follows, to wit:

EXHIBIT 5

October 12, Cash on hand	$31,994.93
October 14, Cash on hand	44,947.46
October 15, Cash on hand	36,297.33
October 16, Cash on hand	40,738.00
October 17, Cash on hand	38,356.05
October 18, Cash on hand	35,780.95
October 19, Cash on hand	32,589.51
October 21, Cash on hand	42,232.39
October 22, Cash on hand	43,154.44
October 23, Cash on hand	42,800.74
October 24, Cash on hand	34,842.53
October 25, Cash on hand	27,063.98
October 12, due from Banks	51,435.59
October 14, due from Banks	59,586.68

October 15, due from Banks	62,751.42
October 16, due from Banks	72,340.77
October 17, due from Banks	67,803.25
October 18, due from Banks	43,932.91
October 19, due from Banks	52,118.08
October 21, due from Banks	40,457.60
October 22, due from Banks	29,829.58
October 23, due from Banks	23,594.90
October 24, due from Banks	22,676.95
October 25, due from Banks	31,029.25

Complainant rests.

DEFENDANT'S EVIDENCE

R. E. SCHUMACHER, duly sworn, testified as follows:

Appointed Receiver of First National Bank of New Bern by Comptroller of the Currency; assumed duties November 5, 1929; have records, assets etc. which came into my [fol. 16] hands; have here (exhibits it) ledger sheet showing personal account of Chas. J. Brinson. That sheet, designated account #417, represents the Savings Account of Chas. J. Brinson, for that period. D-Ex. 1—P.-Ex. 2—D. Ex. 1.

Q. Will you please state, reading from that statement offered the transactions with reference to this bond transaction referred to by the plaintiff, giving dates and amounts?

Record shows Mr. Brinson deposited $2100 October 14, 1929.

Q. What became of that $2100?

This is teller's daily sheet and clearance sheet of First National Bank; original records that came into my hands as Receiver; contain items handed by each teller for date of October 14, 1929.

Transactions of 14th are reflected on 15th.

D. Ex. 2

The First National Bank of New Bern

Clearing House Settlement

666. Date: October 15, 1929.

	Eastern Bank & Trust Co. on them			Citizens Bank & Trust Co. on them
.....	.....	.....	.....	6.00
11.34	8.40	4.00	21.30	4.00
10.00	10.50	18.00	28.00	30.00
25.00	4.60	3.00	54.89	15.00
10.00	1.63	1.25	50.00	6.00
162.37	2.00	9.50	12.00	5.00
275.00	1.15	5.00	8.33	127.65*
[fol. 17]				
1,500.00	1.50	1.00	30.00	5.00
5.25	9.19	11.50	25.00	1.20
24.38	4.21	34.45	1.75	30.60
5.71	1.00	245.56	14.10	36.80s
1.00	1.00	19.76	5.00	200.00
3.00	14.00	36.77	25.00	26.14
1.40	1.00	2.00	10.50	15.12
1.70	1.00	1.45	3.60	2.00
5.20	20.60	77.69	18.03	25.00
9.20	1.75	1.00	5.00	2,100.00
13.75	1.75	29.45	7.07	12.00
3.60	10.90	3.95	10.00	.....
10.00	3.45	20.15	15.00	127.65
20.00	50.00	2.80	2.50	7,278.60
10.00	4.60	21.28	173.69	9,823.31*
1.80	12.00	2.50	20.70	.....
2.00	8.00	5.00	2,171.65s	.....
3.00	3.50	30.00	2,913.80	3,873.38
1.28	5.00	30.00	5,085.45*	57.00
22.80	2.50	25.35	39.00	3,816.38*
2.00	10.00	17.80	150.00	.....
12.50	2.19	1.00	26.45	.....
1.25	3.52	2.00	25.00	.....
5.00	3.78	2.85	91.00	5.00
15.00	100.00	4.50	2.00	37.39
10.00	1.00	7.00	68.17	1.60
2.55	5.00	5.15	384.05	10.86
2.70	7.69	2.00	407.80	1.00
7.60	13.16	1.00	61.09	1.15
10.00	2,913.80*	5.00	74.05	57.00*
17.95	1.00	1.40	21.64	.....
19.32	1.50	1.40	33.55	.....
2.80	1.15	4.90	60.42	.....
6.30	4.50	5.00	12.20	.....
3.00	1.00	8.70	10.34	9,823.31
1.00	4.15	6.65	212.60	3,875.64
3.00	1.00	21.30	1,679.36s	57.00
1.00	5.00	16.50	13.79	.....
1.00	5.00	10.20	500.00	6,004.67*
1.50	1.10	10.40	.....	.....
2.00	10.00	10.15	5,085.45	.....
1.00	5.75	12.50	7,278.60*	.....
8.14	9.20	19.25	8.00	.....

	Eastern Bank & Trust Co. on them			Citizens Bank & Trust Co. on them
7.79	153.80	8.30	1.35	.....
6.75	69.45	18.00	1.00	.....
38.60	.60	18.00	1.50	.....
8.50	5.88	15.80	2.00	.....
3.60	15.52	5.75	2.00	.....
5.00	21.76	.50	.60	.....
162.50	3.50	15.00	1.15	.....
2.58	3.50	6.56	4.00	.....
1.00	17.40	15.10	1.00	.....
20.00	5.79	2.00	2.40	.....
13.75	5.00	3.75	1.90	.....
19.01	5.00	4.35	3.20	.....
5.00	18.25	6.90	4.00	.....
1.50	27.00	7.95	1.05	.....
1.25	16.75	12.18	4.00	.....
6.40	40.11	100.00	7.50	.....
5.00	119.93	1.00	20.00	.....

[fol. 18] Cross-examination:

I did not make record; various tellers of bank made it; I go by the dates stamped on the sheets; never was in New Bern until I came down as Receiver; November 5th; bank had been closed about ten days; closed on 25th October. I came down November 5th.

Redirect examination:

According to records, before he added the $2100. Mr. Brinson had to his credit on 14th $1961.31; the $2100. was deposited October 14th; also, entry of $127.50 deposited 14th, making balance to his credit, Savings Account, $4188.81; October 21st withdrawal of $3964.60 left balance $224.21; there appears a credit in the Bond Account October 21st of $3964.60. The record shows credit entry of $3964.60 and a corresponding debit entry of $3964.60 on October 21, 1929.

Recross-examination:

That record (exhibited) is from daily sheets of the Tellers daily debits and credits and clearings of First National Bank of New Bern.

Redirect examination:

Credit entry was made to "Bond Account"; This account shows the credit and debit entries of bond transactions of

the First National Bank; shows credit entry October 21 of $3964.60.

Deposit slip October 14, 1929, Chas. J. Brinson, $2,100 Offered; exhibited.

[fol. 19] D. Ex. 3

The First National Bank

Deposited by Chas. J. Brinson

New Bern, N. C., 10/14, 1929.

In receiving items for deposit or collection, this bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are accepted subject to final payment in cash or solvent credits. This bank will not be liable for default or negligence of its duly selected correspondents nor for losses in transit, and each correspondent so selected shall not be liable except for its own negligence. This bank or its correspondents may send items, directly or indirectly, to any bank including the payor, and accept its draft or credit as conditional payment in lieu of cash; it may charge bank any item before final payment, whether returned or not, also any item drawn on this bank not good at close of business on day deposited.

	Dollars	Cents
Currency		
Silver		
Gold		
Checks	2,100	00

Svgs. a/c—417.

Only deposit slip for like amount that date.

I have gone thru daily Teller's sheets, and checked the cash in Bank each day from the 12th to 25th October inclusive; and in doing this took the account of currency, coin and all the amounts of cash for purpose of making up total amount of cash at close of the day's business, on each day, and they are as follows:

[fol. 20]

October	12	$13,361.16
	14	22,831.13
	15	22,787.83
	16	29,578.31
	17	26,852.74
	18	24,865.92
	19	15,982.54
	21	22,246.43
	22	31,889.54
	23	32,767.54
	24	21,665.53
	25	14,658.18

The records show that the $2100 deposited by Mr. Brinson went into the cash items on that day; the records do not show that the $2100 deposited on October 14th went into the cash which I have read as of that date. The $2100 item was cleared with the Eastern Bank & Trust Company on October 15, 1929.

The defendant here offered the Clearing House Settlement marked defendant's exhibit 2, which is set out in the record.

(Witness was not allowed to testify to any conclusions as to what the records show.)

Plaintiff then offered in evidence Teller's sheet and clearance sheet, being the defendant's exhibits 5 and 6 as follows:

Same as Defendant's Exhibit 2.

The witness then stated: "That on October 15th the items drawn on the Eastern Bank were less than the items the Eastern Bank had drawn on the National Bank as shown by these statements by $5,801.00."

The plaintiff then offered in evidence Remittance sheets of the First National Bank to the Norfolk National Bank of Commerce & Trusts, of Norfolk, Va., for October 15, 1929, which is defendant's Exhibit 7, as follows:

[fol. 21] EXHIBIT 7

11,908.88*	Total									11,908.88
Oct. 15				9	Oct. 15					9
Nflk. National Bank of Commerce & Trusts					Norfolk National Bank of Commerce & Trusts					
Norfolk, Va.					Norfolk, Va.					
307	68	36	979.45					86,804		67.65
183			320.79					86,748		42.38
516			5.65					86,772		40.75
		86,125	72.81					86,770		55.92
		86,800	66.00					86,821		68.42
		86,822	97.61	66				85,872		132.90
		86,733	17.41					86,725		159.50
		85,854	157.61				613	68	45	180.30
		85,908	80.84							3,936.68*
		86,022	110.33				47	66	80	2.20
		85,810	85.12	66				68	36	2.20
		86,130	114.50					66	372	2.20
		86,807	63.25	66			1044	68	36	20.00
		85,627	42.64				183	68	123	16.80
		86,760	54.10				62	68	36	5,801.09
		86,759	29.90				35	68	123	51.80
		86,795	37.44				61	68	34	500.00
		85,811	102.77					85,818		55.73
		86,765	61.90					85,815		63.49
		85,817	54.43					85,819		54.01
		86,794	37.44					85,478		23.92
		86,013	53.02					85,475		71.12
		58,816	71.13					86,801		8.80
		85,813	63.51					85,974		51.12
		85,821	22.50					86,809		32.20
		85,814	57.56					86,753		61.90
		86,779	54.88	142				86,015		78.14
		85,620	20.14	27				85,975		9.15
		85,886	22.88	104				85,956		64.45
		86,741	100.22	1008				86,740		107.02
		86,792	52.20					85,476		26.00
		86,823	78.83					86,736		100.24
								86,790		35.50
								86,808		44.35
								86,817		18.88
								68	36	28.22
								68	123	140.17
								66	80	1.50
								68	70	500.00

The Remittance Sheet of the Norfolk National Bank of Commerce & Trusts of Norfolk, consisted of a number of items which show a total of $11,908.88, and on this sheet is an item of $5,801.09.

[fol. 22] The defendant then offered in evidence the entries on the General Ledger from October 1 to October 25th, inclusive, of the account of the Norfolk National Bank of Commerce & Trusts, and calls the Court's attention to the

fact that on the 15th day of October, 1929, the National Bank of Commerce & Trusts is credited with an item of $11,908.88 in this account, and the plaintiff by the same record calls the Court's attention that on the same date the First National Bank of New Bern received from the Norfolk National Bank of Commerce & Trusts $12,721.39. Entries introduced, viz.:

D. Ex. 4

Sheet No. 5.
Name of Account: —— ——.

Norfolk National Bank of Commerce & Trusts, Norfolk, Va.

Date	Description	Charges	Credits	Debit balance	Credit balanec
1929.					
Oct. 1	.....	8,140.53	3,382.28	4,574.38	.....
2	.....	3,319.31	13,115.06	.....	8221.37
3	.....	5,448.52	986.42	.....	759.27
4	.....	5,577.28	5,798.25	.....	980.24
5	.....	4,433.64	2,080.85	1,372.55	.....
7	.....	7,695.34	9,190.92	.....	123.03
8	.....	2,791.83	4,556.69	.....	1,887.89
9	.....	5,360.00	3,413.39	58.72	.....
10	.....	7,142.57	7,412.32	.....	211.03
11	.....	4,355.92	761.19	3,383.70	.....
12	.....	8,174.21	3,226.48	8,331.43	.....
14	.....	2,034.62	139.93	10,226.12	.....
15	.....	11,908.88	12,721.39	9,413.61	.....
16	.....	7,108.71	3,072.80	13,449.72	.....
17	.....	10,645.80	15,649.37	8.446.15	.....
18	.....	1,802.78	16,059.49	.....	5,810.56
19	.....	7,784.03	1,746.02	227.45	.....
21	.....	4,000.01	10,065.07	.....	5,837.61
22	.....	11,365.89	11,306.77	.....	5,778.49
23	.....	2,155.05	2,557.36	.....	6,180.80
24	.....	4,442.57	4,079.70	.....	5,817.93
25	.....	5,764.88	917.15	.....	970.20

The witness further testified: "In making my tabulation of the cash on the dates mentioned, I only counted and included in this amount the gold, currency, silver and minor [fol. 23] coins, I did not include the cash items represented by unpaid checks on hand.

On cross-examination the witness stated: "The record does not show that on the 15th of October 1929, the First National Bank received from the National Bank of Commerce & Trusts a larger sum than it remitted; these were drafts drawn against the account, one the debit and the other the credit charges, which shows that on October 15th, the First National Bank remitted to the Norfolk National

Bank of Commerce & Trusts $11,908.88, and on the same day issued its drafts against their account to the amount of $12,739.21, balances shown as $9413.61 exchanges made between banks by clearing for convenience to avoid transferring currency. The same day this $2100 was deposited, the National Bank received from the Eastern Bank & Trust Company drafts on Norfolk for $5801.09, being the clearance balance; funds in the National Bank were not included up to that amount it was paper debits and credits; not the same thing as passing money. The Eastern Bank was solvent so far as I know; it was a debit and credit transaction. The item was not drawn on the First National Bank; it went into the First National; they have three or four tellers in the First National, each man had his own cash. For that particular day, these sheets represent the aggregate of the three tellers' cash, currency and minor coin. The paper, Plaintiff's Exhibit 1, is in Mr. Caroon's handwriting. The numbers on remittance letters show how clearance is had and each bank has a number, one of those is the number of the Eastern Bank and the other the National Bank of Commerce."

Redirect examination:

"The total of the Tellers' sheets shows total money in bank, cash includes gold, currency, silver and minor coins; no unpaid checks or paper memorandum included. The records show credit to Mr. Brinson's account by debit and credit entries passing through channels of the Bank; the records do not show that the $3964.60 was charged by the Bank to buy bonds; that receipt, Plaintiff's Exhibit 1", signed by Caroon."

[fol. 24] The plaintiff is recalled and testified as follows: "Mr. Motter was the first man that come here and took charge of the First National Bank after it failed. I had no control over the way the First National Bank handled this money after I turned it over to them; I put it there to buy bonds and he was to get me U. S. registered bonds."

Evidence closed.

MOTION TO DISMISS

At the close of all the evidence, the defendant moved for a Decree dismissing the Bill, for that:

1. Complainant failed to show augmentation of funds maintained;

2. Complainant fails to trace any portion of the fund into the hands of the Receiver.

The Court took cause under advisement, and on December 29, 1930, entered decree, as appears of record, declaring complainant entitled to recover $3,964.60 as set out in said decree,

To which decree the defendant excepted and gave notice of appeal, in accordance with the Court rules.

Exception No. 1.

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing is allowed and will be filed as the Bill of Exceptions on appeal in this cause.

This March 23, 1931.

I. M. Meekins, United States District Judge.

[fol. 25] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NORTH CAROLINA, NEW BERN DIVISION

No. 297

CHARLES J. BRINSON

vs.

RAYMOND E. SCHUMACHER, Receiver of the First National Bank of New Bern, N. C.

JUDGMENT—Filed Dec. 29, 1930

This cause coming on to be heard before His Honor I. M. Meekins, Judge, at the Special December Term 1930 of the United States District Court for the Eastern District of North Carolina, New Bern Division, and being heard by the Court, the Court finds the following facts from the evidence to-wit:

That the First National Bank of New Bern was a banking corporation duly chartered under the laws of the United States and conducted a general banking business in the City of New Bern prior to the twenty-sixth day of October, 1929, and on said date, said banking institution became insolvent and closed its doors, and the defendant Raymond E. Schumacher was duly appointed by the Comptroller of the Currency and qualified as Receiver of said bank, and has since said time continued to act as such Receiver; that at the time of his appointment and qualification, the said defendant Schumacher took over and has since said time had in his hands all of the assets of the aforesaid banking institution;

That on or about the nineteenth day of October, 1929, the plaintiff delivered to the said First National Bank of New Bern Thirty-nine Hundred Sixty-four and 60/100 ($3964.60) Dollars in cash, or its equivalent, and directed and requested the said First National Bank to buy for him and for his account four thousand dollars in par value of United States Government bonds, Fourth Liberty Loan 4¼%, to be registered bonds in his name, and the said Bank [fol. 26] undertook and agreed to accept and did accept said money for the purchase of such bonds for the plaintiff, and wrongfully failed and neglected to do so but commingled said funds with other funds in said Bank, advising the plaintiff that the bonds had been purchased in accordance with his directions and would be received in a few days, and continued to hold the plaintiff's money so commingled with the other funds in said Bank until the said First National Bank was closed and placed in the hands of the defendant Receiver on or about the twenty-sixth day of October, 1929; the said sum of Thirty-nine Hundred and Sixty-four and 60/100 ($3964.60) Dollars so placed in said Bank and wrongfully commingled and misapplied, was delivered to said Bank under the expressed direction and agreement for the purchase of the bonds aforesaid for the plaintiff and for no other purpose, and after said money was so accepted by the Bank, it did not order or deliver the bonds to the plaintiff; and that the assets of said bank were increased and augmented by plaintiff's money to the full extent of Thirty-nine-Hundred Sixty-four and 60/100 ($3964.60) Dollars.

That after the moneys of the plaintiff was so placed in

the Bank for the purpose aforesaid and wrongfully and unlawfully commingled by the said Bank with its other funds, the said Bank at all times thereafter until it was closed and placed in the hands of the defendant Receiver, had more than sufficient cash on hand to pay the amount due the plaintiff and at the time the Receiver took charge of said Bank, took and accepted among the assets of said Bank more than sufficient amount in cash to pay the amount due to the plaintiff, and still has from the assets of said bank more than a sufficient sum in cash to pay the same.

It is thereupon considered, ordered and adjudged by the Court that the plaintiff have and recover of the defendant Raymond E. Schumacher, Receiver of the First National Bank of New Bern the aforesaid sum of Thirty-nine Hundred Sixty-four and 60/100 ($3964.60) Dollars, the trust sum belonging to the plaintiff by reason of the special deposit aforesaid, and said Receiver is directed to pay the same in full out of the funds coming into his hands as such [fol. 27] Receiver of the First National Bank of New Bern;

It is further considered, ordered and adjudged by the Court that the defendant will pay the costs of this action to be taxed by the Clerk.

I. M. Meekins, United States District Judge.

To this decree the defendant objects and excepts.

Meekins, Judge.

Entered and filed this December 29th, 1930.

In United States District Court

Assignment of Errors

(Style of court and title omitted)

Now comes, defendant, above, by his solicitors, and says that the decree herein entered December 29, 1930, is erroneous, and files, with his petition for appeal his assignment of errors, as follows:

1. The Court in overruling defendant's motion for decree dismissing the action, for that (a) complainant, by the uncontradicted evidence, failed to show that any part of al-

leged funds came into the Receiver's, defendant's hands; it contrarywise appearing specifically that, at least, $2100 thereof "was wiped out in the Norfolk National Bank of Commerce & Trust; and, (b) Complainant, utterly failed to show any augmentation of assets, or maintainance thereof, between date of complainant's alleged deposit and suspension of Bank's business: the uncontradicted evidence (offered by complaint) being that assets taken over by Receiver were less than at time complainant deposited his funds—which he alleges were "intermingled," as found by Court;

2. The court erred in holding that any part of the $2100 ever came "as cash" into said National Bank—the uncon- [fol. 28] tradicted evidence being that 'twas represented by check of complainant on Eastern Bank & Trust Company, and was cleared thru Norfolk Bank. And no effort is made, in decree (or any "finding of fact" or "law"), to distinguish between the $2100, the $1,961.31 already on deposit, and the $127.50—

3. The Court errs in conclusion in decree in that (a) the fund is treated as "trust fund" (referring to the deposit of $2100 on October 14th) and "as special deposit"—the holding being applied as well to the fund on deposit prior to alleged creation of "the trust," and (b) no distinction is indicated as to "fact" on which "conclusion" is made to rest:

4. The Court erred in holding that "said Bank at all times thereafter until it was closed and placed in hands of defendant Receiver, had more than sufficient cash on hand to pay the amount due plaintiff" and "at time Receiver took charge, took and accepted among the assets of said bank more than sufficient to pay the amount due to plaintiff", and "still has from the assets of said bank more than sufficient sum in cash to pay the same," for that (a) such conclusion is contrary to the uncontradicted evidence; (b) complainant offered no evidence to show that the Receiver ever received any portion either of the $1961.31, or the $2100; (c) contrarywise it appears that said funds were "intermingled", and diverted;

5. The Court erred in holding complainant entitled to preferred payment, for that (a) Complainant utterly fails

to trace any portion of his claimed funds into Receiver's hands; (b) the Bank's records disclose no augmentation, maintained, by reason of complainant's deposit; (c) the funds were dissipated, and never reached the Receiver's custody;

6. The court erred in not "finding the facts specifically and stating separately its conclusions of law thereon"; the decree being supported by incorrect application of the law to facts—stated unsupported by any evidence.

7. The court erred in not finding, from the uncontradicted [fol. 29] evidence (and complainant's own testimony) that said funds have not been traced into the Receiver's hands; that said funds were dissipated at suspension of the Bank; that said deposit did not augment the Bank's assets; that said funds never got into the Bank's "cash."

8. The Court erred in signing any decree for complainant; the whole, uncontradicted evidence,—upon proper finding of facts—compelling conclusion of law contrary to complainant's contentions.

Wherefore, defendant prays that the said decree of the said United States District Court may be corrected and reversed.

This 24th day of February, 1931.

Respectfully submitted,

J. O. Carr, Julius F. Duncan, Solicitors for Appellant, Defendant, Receiver.

IN UNITED STATES DISTRICT COURT

MEMORANDUM UNDER SEC. 7, RULE 14 AND RULE 23

(Style of court and title omitted)

1. Petition for appeal, dated February 24, 1931;
2. Copies of petition, with bill of exceptions and asssignment of errors, furnished appellee's counsel 26th February, 1931 (original notice Feb. 24th, 1931 transmitted);
3. Order allowing appeal March 23, 1931;
4. Citation dated March 23, 1931;
5. Service of citation March 27, 1931;

[fol. 30] 6. Appeal bond, date: March 23, 1931; Penalty $250.00; Raymond E. Schumacher, as Receiver of First National Bank of New Bern, N. C. and Judson C. Jones, obligors; conditioned for payment of costs;

7. Order enlarging time from May 1, 1931 to May 15, 1931 for docketing case and filing record thereof with Clerk of the Circuit Court of Appeals, of fourth circuit.

S. A. Ashe, Clerk, by Geo. Green, Deputy Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 31] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 3183

R. E. SCHUMACHER, Receiver of the First National Bank of New Bern, Appellant;

versus

CHARLES J. BRINSON, Appellee

Appeal from the District Court of the United States for the Eastern District of North Carolina, at New Bern

May 6, 1931, the transcript of record is filed and the cause docketed.

Same day, the original notice of appeal, petition for appeal, order allowing appeal, bond and citation are certified up under Sec. 7 of Rule 14.

Same day, order enlarging time to file record is filed.

Same day, the appearance of Julius F. Duncan is entered for the appellant.

May 9, 1931, the appearance of J. O. Carr is entered for the appellant.

May 13, 1931, the appearance of L. I. Moore is entered for the appellee.

May 18, 1931, twenty-five copies of the printed record are filed.

[fol. 32] Argument of Cause

July 1, 1931 (June term, 1931), cause came on to be heard before Parker, Northcott and Soper, Circuit Judges, and is argued by counsel and submitted.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3183

R. E. SCHUMACHER, Receiver of the First National Bank of New Bern, Appellant,

versus

CHARLES J. BRINSON, Appellee

Appeal from the District Court of the United States for the Eastern District of North Carolina, at New Bern

(Argued July 1, 1931. Decided October 12, 1931)

Before Parker, Northcott, and Soper, Circuit Judges

Julius F. Duncan (J. O. Carr on brief) for Appellant, and L. I. Moore (Moore & Dunn on brief) for Appellee.

OPINION—Filed October 12, 1931

[fol. 33] PARKER, Circuit Judge:

This is an appeal by the Receiver of the failed First National Bank of New Bern, N. C., from a decree holding that the funds coming into his hands were charged with a trust in favor of the complainant, Charles J. Brinson, to the extent of $3,964.60, and directing that he pay this amount to complainant from such funds. The complainant contends that he intrusted $3,964.60 to the bank for the purchase in his behalf of United States bonds which the bank failed to purchase. The receiver admits that complainant had this amount on deposit in the bank and that his account was charged with the amount under a promise to apply same in the purchase of bonds for him; but denies that the assets of the bank were augmented as a result thereof or that complainant has traced any moneys held in trust for him into funds coming into the hands of the receiver.

The facts are that the failed bank was engaged in the business of purchasing bonds for its customers and kept a regular account of funds delivered to it for that purpose. On October 10, 1929, complainant arranged with the

officials of the bank to purchase bonds for him and was advised to bring in the necessary money and they would be purchased. He already had $1,961.31 on deposit to his credit and on October 14th, to provide the additional funds necessary, he deposited to his account $2,100.00, in the form of a check drawn on the Eastern Bank & Trust Company. On October 19th he was notified that his account had been charged with $3,964.60 for the purchase of the bonds, and the records of the bank show that his account was actually charged with this amount on October 21st, and that on the same date the bond account was credited with a deposit of a like amount. The bonds were never in fact purchased, and the bank closed its doors on October 26th.

At the time of the closing of the bank its cash and cash items amounted to $27,963.98, of which $14,658.18 was actual cash. On October 14th cash and cash items were $44,947.46 and cash $22,831.13. On October 19th they were $32,589.51 and $15,982.54, respectively. On October 21st they were $42,232.39 and $22,246.43. At no time during the period in question did cash and cash items fall below $27,000.00 or actual cash below $14,000.00.

[fol. 34] With respect to the $2,100.00 check drawn by plaintiff on the Eastern Bank & Trust Company, it appears that this was used by the failed bank in a clearance on October 15th, in which the failed bank received from the Eastern Bank & Trust Company $5,801.09 over and above the items which that bank presented against it. This $5,801.09 was in turn used by the failed bank in clearing with the Bank of Commerce & Trusts of Norfolk, and its balance with that bank, after the clearance, was exceeding $10,000.00.

It would seem clear that as a result of the deposit by plaintiff of the $2,100.00 check the assets of the failed bank were augmented by that amount at the time; but we need not go into this matter, as we are satisfied that upon an entirely different principle complainant is entitled to the relief which he seeks. He unquestionably had to his credit on October 19th more than enough money to pay for the bonds. On that date the bank agreed to charge his account with the amount necessary to make the purchase and to use the funds so derived for that purpose. It actually did so charge his account, at the same time crediting its bond account with a like sum. When these transactions occurred

it had in its vaults cash far in excess of the amount necessary for the purchase of the bonds; and we think that as a result of the agreement a trust was impressed upon this cash to the extent of the amount necessary to make the purchase.

There can be no question but that if complainant had actually paid over the cash necessary to purchase the bonds, the bank would have taken same as a trust fund, and if it had mingled same with the cash in its vaults, the whole would have been impressed with a trust in favor of complainant to the extent of the trust fund received. See Schumacher, Receiver, vs. Harriett, this day decided, — Fed. (2nd) —. It can make no difference that, instead of cashing a check and then delivering the money to the bank for the purchase of the bonds, he allowed his account to be charged with the amount necessary. The bank had on hand funds more than sufficient for the purpose, and by the agreement with complainant they were impressed with a trust in his favor. Davis vs. McNair, (C. C. A. 5th) 48 Fed. (2nd) 494; State vs. Grills, 35 R. I. 70, 85 Atl. 281, 283; Northwestern Lumber Co. vs. Scandinavian-American [fol. 35] Bank, 130 Wash. 33, 226 P. 825, 829; State vs. Exchange Bank of Bristow, 112 Neb. 834, 201 N. W. 895, 896.

In State vs. Grills, supra, 35 R. I. 70, 85 Atl. 281, 283, the rule applicable in such case is well stated as follows:

"The ordinary relation of a banker and his customer is that of debtor and creditor as to the deposits made by the customer with the banker. This relation, arising upon a general deposit, may be changed as to the whole or a part of such general deposit. Without actual delivery to the customer, and a redeposit by him for a special purpose, such general deposit by agreement may be converted into a special deposit and become a fund in the hands of the banker with which he is intrusted for the specific purpose named in the agreement creating the special deposit. Such fund is impressed with a trust, the violation of which is a fraud."

The reason underlying the rule is that, by agreement between the parties, a general deposit may be converted into a special deposit (Morse on Banks and Banking, 6th

Ed., Vol. 1, Sec. 188, p. 575), and that a special deposit is in the nature of a trust toward which the bank occupies the position of a trustee. In re Gans & Klein, 14 Fed. (2nd) 116, 117; Morse on Banks & Banking, 6th Ed., Vol. 1, Sec. 325, p. 757; 3 R. C. L. 558.

In Davis vs. McNair, supra, the facts were very similar to those in the case at bar. A bank had agreed to purchase bonds for a depositor and to charge same against his deposit account. The funds on deposit were more than sufficient to pay for the bonds; and the amount necessary to pay for same was by agreement withdrawn from the checking right of the depositor. In holding that a trust was created, the Circuit Court of Appeals, speaking through Judge Walker, said:

"The arrangement between the plaintiff and the bank with reference to buying the Liberty bonds would not have been substantially different in effect if the plaintiff had checked out the amount on deposit to his credit and had then delivered that amount in cash to the bank upon the latter's agreeing to use that sum in buying the Liberty bonds desired by plaintiff. By what was done the relations of the parties with respect to the funds were so changed [fol. 36] that thereafter the deposit was in the nature of a special one, having the trust feature of a special deposit."

It should be noted that we are not dealing with a trust asserted on the ground that the assets of the bank have been augmented by a payment made to it. In such cases it is held that the receipt by the bank of a check drawn against the account of a depositor does not augment its assets. Ellerbe vs. Studebaker Corporation of America, 21 Fed. (2nd) 993, 995, and cases there cited. What we have is in effect an agreement by the bank that a definite amount of the funds in its possession shall be held in trust for a specified purpose. In other words, what the record discloses is, not a shifting of credits, but the creation of a trust with respect to funds already in the bank's possession.

On the same principle the case is to be distinguished from that which would have been presented by a mere breach of agreement on the part of the bank to purchase bonds for complainant. If nothing more had occurred than that the

bank had agreed to purchase bonds for him to be paid for later out of funds on deposit, it may well be that no trust would have arisen. But something more did occur. The bank charged his account with the price of the bonds and credited its bond account with the amount charged. In other words, it paid to itself the money necessary for the purchase of the bonds and charged itself with same as trustee. As it had in its vaults the funds to carry through the transaction as entered on its books, and as equity regards that as done which should have been done, funds to an amount necessary to purchase the bonds must be deemed to have been held in trust for that purpose.

As stated above, the cash funds in the bank never fell below what was necessary to discharge this trust. It is clear, therefore, that the funds which passed into the hands of the receiver were impressed with a trust to that extent in favor of complainant. Schumacher, Trustee, vs. Harriett, supra; Poisson vs. Williams, Receiver, 15 Fed. (2nd) 582.

The decree of the court below will be affirmed.

Affirmed.

[fol. 37] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3183

R. E. SCHUMACHER, Receiver of the First National Bank of New Bern, Appellant,

versus

CHARLES J. BRINSON, Appellee

Appeal from the District Court of the United States for the Eastern District of North Carolina

DECREE—Filed and entered October 17, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

October 17, 1931.

John J. Parker, Senior Circuit Judge.

[fol. 38] In United States Circuit Court of Appeals

Memorandum as to Mandate

On another day, to-wit, November 17, 1931, the mandate of this Court in this cause is issued and transmitted to the United States District Court at New Bern, North Carolina, in due form.

Same day, the original notice of appeal, petition for appeal, order allowing appeal and bond are returned to the Clerk of the District Court at New Bern, North Carolina.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 39] Supreme Court of the United States

Order Allowing Certiorari—Filed February 23, 1932.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,453. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 639. L. J. Blakey (successor to R. E. Schumacher), receiver of the First National Bank of New Bern, New Bern, North Carolina, petitioner, vs. Charles J. Brinson, ~~receiver~~. Filed January 16, 1932. File No. 36,453.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 639

L. J. BLAKEY (Successor to R. E. Schumacher), Receiver of the First National Bank of New Bern, New Bern, North Carolina, Petitioner,

vs.

CHARLES J. BRINSON, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

J. O. CARR,
JULIUS F. DUNCAN,
GEORGE P. BARSE,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No.

L. J. BLAKEY (Successor to R. E. Schumacher), Receiver of the First National Bank of New Bern, New Bern, North Carolina, Petitioner,

vs.

CHARLES J. BRINSON, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Your petitioner, L. J. Blakey, as Receiver of the First National Bank of New Bern, New Bern, North Carolina, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fourth Circuit, rendered in the above case (R. 37).

After the argument of the case in the Circuit Court of Appeals, and prior to the decision thereof, peti-

tioner, L. J. Blakey, succeeded R. E. Schumacher as Receiver of the said First National Bank of New Bern, by virtue of an appointment by the Comptroller of the Currency of the United States, and hence files this petition as such successor.

I.

Summary of Matters Involved.

The United States District Court for the Eastern District of North Carolina rendered judgment (R. 25) allowing respondent, Charles J. Brinson, a preferred claim against the cash in said First National Bank of New Bern at its suspension. The receiver of the suspended bank appealed to the Circuit Court of Appeals, and the judgment of the District Court was affirmed, and petitioner now seeks a review of the decree of the Circuit Court of Appeals.

On October 14, 1929, respondent Brinson had a deposit balance of $1,961.31 in the First National Bank of New Bern, and on that date deposited therein the further sum of $2,100, said additional deposit being in the form of a check drawn upon the Eastern Bank & Trust Company of New Bern, North Carolina, thereby making his deposit balance $4,061.31 (R. 10, 12, 18, 19). At the time of the deposit the bank agreed to buy for Brinson United States Government bonds of a par value of $4,000, with the understanding that the purchase price thereof was to be charged against his deposit account. The aforesaid deposit of $2,100 was made by Brinson for the specific purpose of building up his deposit balance so as to enable it to be used

in the purchase of the bonds (R. 10-13). On October 19th the bank advised Brinson that the bonds had been bought for him (which was untrue) and a memorandum of a charge to his account of the contemplated purchase price of the bonds in the sum of $3,964.60 was given him. The actual charge against the account was made on October 21st, and on the same date the bank's "bond account" was credited with the sum of $3,964.60 (R. 12-14-18). For some reason not explained by the record, the bonds were not actually ordered for nor delivered to Brinson and had not been ordered up to the time of suspension of the bank on October 25, 1929. At all times between October 14th and the date of suspension of the bank, there was actual cash in the vaults of the bank in excess of the sum of $3,964.60, the supposed purchase price of the bonds (R. 19-20).

The aforesaid check of $2,100 on the Eastern Bank & Trust Company was forwarded to that bank, with other items, and the clearing balance between the two banks was in favor of the First National Bank to the extent of $5,801.09 (R. 20), and the First National Bank received in payment drafts in the sum of $5,801.09 upon the Norfolk National Bank of Commerce & Trusts, which drafts were forwarded to the Norfolk Bank for credit of the First National Bank. Said credit was entirely dissipated through drafts upon the Norfolk Bank issued by the First National Bank and by subsequent disbursements from the account so that at the close of business on October 25th the First National Bank had not only exhausted its balance with the Norfolk Bank, but had incurred an overdraft of $970.20 (R. 20-23), the result being that the receiver of the

suspended bank acquired no portion of the proceeds of the original check of $2,100 at the time he took over the assets of the suspended bank (R. 22).

After due demand on the Receiver, Brinson brought suit for allowance in the sum of $3,964,60 of a preferred claim or lien upon the cash taken over by the Receiver (R. 3). The Receiver defended on the ground that the proceeds of the deposit account of Brinson had not augmented or increased the bank's assets, and that no funds or property belonging to the plaintiff could be traced to the cash taken over by the receiver at suspension (R. 24). The District Court held that there had been augmentation of assets of the bank and tracing of the deposit account to the cash in the hands of the receiver and that a preferred claim should be allowed. The Circuit Court of Appeals also held that there was augmentation, but that irrespective of augmentation the cash in the bank at the time of the transaction was impressed with a trust for the full amount of the supposed purchase price of the bonds, and thereupon affirmed the judgment of the District Court and allowed the preferred claim.

II.

Reasons for Granting the Writ.

THE FACTS IN THE CASE ARE NOT IN DISPUTE. PETITIONER COMPLAINS OF THE CONSTRUCTION OF SAID FACTS AS A MATTER OF LAW WHEREIN IT WAS HELD:

(1) That augmentation of assets and tracing to the receiver existed, and

(2) That irrespective of augmentation and tracing a preferred claim was proper by reason of the cash in the bank being impressed with a trust in favor of the plaintiff.

Petitioner feels that writ of certiorari should be granted because:

(*a*) The decision and decree of the Circuit Court of Appeals involves a Federal question relating to the rights of creditors against national banks under the National Banking Laws, and the decision of the Circuit Court of Appeals appears to be in conflict with the principles of law established in analogous cases by this Honorable Court. *Schuyler* v. *Littlefield,* 232 U. S. 707, 710, 713; *Cunningham, Trustee of Ponzi,* v. *Brown,* 265 U. S. 1, 11; *St. Louis & S. F. R. R.* v. *Spiller,* 274 U. S. 304, 310.

(*b*) The decision of the Circuit Court of Appeals is in conflict with the principles of law established by the decisions of the Circuit Courts of Appeal in analogous cases in other circuits, namely:

Eighth Circuit:

Larabee Flour Mills v. *First National Bank,* 13 F. (2) 330, 331.

Beard v. *Independent District of Pella City,* 88 F. 375, 382, 383.

Empire State Surety Co. v. *Carroll County,* 194 F. 593, 604, 605, 606.

Hirning v. *Federal Reserve Bank,* 52 Fed (2) 382.

Sixth Circuit:

Brennan v. *Tillinghast*, 201 Fed. 609, 612, 613.

Ninth Circuit:

Titlow v. *McCormick*, 236 Fed. 209, 211, 212.

Tenth Circuit:

Blumenfeld v. *Bank*, 38 Fed. (2) 455.

Second Circuit:

American Can Company v. *Williams*, 178 Fed. 420.

The foregoing cases in the various circuits, and the decisions of this Honorable Court, above cited, establish the principles of law *that a preferred claim can be allowed against the estate of an insolvent only where* (1) the transaction with the preferred claimant resulted in augmentation or increase of the assets of the insolvent by the property of the claimant or the proceeds thereof in the form of actual cash or other tangible assets (as distinguished from the establishment and appropriation or dissipation of a deposit or book credit) and (2) that such property or assets of the preferred claimant, or other property identified as being in lieu thereof, can be traced into the hands of the receiver or trustee taking over the assets of the insolvent at the time of suspension or bankruptcy, and (3) that the burden of showing the facts of augmentation and tracing is upon the preferred claimant and that the law will not presume augmentation and tracing. Assuming such principles of law to be controlling in the establishment of preferred claims, it would appear that the decision of the Circuit Court of Appeals is

clearly contrary to such principles for the reasons that augmentation and tracing did not exist in the instant case, and the court was in error in its construction of the principles of law relating to augmentation and tracing and also in holding, as a matter of law, that a preferred claim existed regardless of augmentation.

(*c*) The Circuit Court of Appeals has decided an important question of general law relating to insolvent estates, in a way probably untenable and in conflict with the weight of authority indicated by the foregoing decisions.

(*d*) The precise kind of case decided by the Circuit Court of Appeals has not, apparently, heretofore been passed upon by this Court. Since the decision of the Circuit Court of Appeals in this case and since the decision of the Circuit Court of Appeals for the Fifth Circuit in the somewhat similar case of *Davis* v. *McNair*, 48 Fed. (2) 494 (relied upon by the Circuit Court of Appeals in the instant case), a considerable number of cases have arisen in the districts covered by these circuits, and the District Courts apparently have no alternative but to follow the decisions of the Circuit Courts of Appeal in the Fourth and Fifth Circuits, and the indications are that if the principles established by the decision in the instant case are permitted to stand, the basis and scope of claims against insolvent national banks in receivership will be very substantially broadened, and a considerable number and amount of claims will have to be allowed, to the detriment of the general creditors. The Comptroller of the Currency is charged with the liquidation of hundreds of in-

solvent national banks throughout the country, and consequently it is important that the questions of law involved in the instant case be determined by this Honorable Court so that the policy of the Comptroller's office in such administration may be uniform in application in the various circuits of the several circuit courts of appeal of the United States. It is felt that in the interest of establishing uniformity in the various circuits, this Honorable Court should pass upon the questions of law in issue in the instant case, just as was done, for the same reason, in the case of *Jenkins, Receiver,* v. *National Surety Co.,* 277 U. S. 264.

WHEREFORE it is respectfully prayed that the petition for writ of certiorari be granted.

J. O. CARR,
JULIUS F. DUNCAN,
GEORGE P. BARSE,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. -

L. J. BLAKEY (Successor to R. E. Schumacher), Receiver of the First National Bank of New Bern, New Bern, North Carolina, Petitioner,

vs.

CHARLES J. BRINSON, Respondent

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 52 Fed. (2) 821, and appears in the Record at pages 32-37. Judgment of the United States District Court appears in the Record at pages 25-26.

II.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered October 17, 1931 (R. 37). Jurisdiction is con-

ferred upon this court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, Section 347).

III.

Statement of Case.

A statement of the case is set out in the foregoing petition under the caption "Summary of Matters Involved," to which reference is here made. Such elaboration of the facts as appears to be pertinent and necessary to the discussion will be indicated where appropriate.

IV.

Specification of Errors.

(a) The Circuit Court of Appeals held that upon the facts stated the transaction of the plaintiff with the insolvent bank resulted in augmentation of the assets of the bank. This was error for the reason that according to the undisputed facts the respondent Brinson established a deposit balance and this deposit balance was transferred as a matter of bookkeeping from his account to the bond account of the bank and no new funds came into the bank as a result thereof. The proceeds of the $2,100 check included in the deposit did not result in augmentation of the bank's assets, but the credit therefrom resulting in the correspondent of the suspended bank was entirely dissipated before suspension, and no assets came into the hands of the receiver from said check.

(*b*) The Circuit Court of Appeals held that irrespective of augmentation and tracing, the cash in bank at the time of the transaction of respondent Brinson with the bank was impressed with a trust in his favor in the sum of $3,964.60, the anticipated purchase price of the bonds, and that a preference claim should be allowed. This was error for the reasons that (1) a preferred claim cannot properly be allowed against an insolvent estate unless there is augmentation of assets and a tracing of those assets or the proceeds thereof to the receiver or trustee taking over the estate of the insolvent; (2) the bank had no funds belonging to the plaintiff, but only a credit balance in his favor arising out of the relationship of debtor and creditor between the bank and its depositor, and (3) the cash in the bank was not the cash of the depositor Brinson but the property of the bank, and no part thereof was segregated, or intended to be segregated, for the use of the plaintiff, and the credit balance upon the books in favor of Brinson could not properly be traced into the cash of the bank.

V.

SUMMARY OF ARGUMENT.

A preferred claim against a national bank can exist only where the transaction of the claimant with the bank has resulted in a relationship of trust between the bank and the claimant, and where, in addition, the assets of the bank have been augmented or increased by new cash or property accruing from the claimant, and where said funds or property can actu-

ally be traced to the assets taken over by the receiver of the bank at suspension. No augmentation and tracing occurs where the transaction results only in the appropriation or use of a deposit or credit balance, the same constituting, in such case, merely a shifting of bookkeeping credits, and no tracing exists where, assuming augmentation, the proceeds of augmentation are entirely dissipated or disbursed prior to suspension of the bank. No augmentation or tracing existed in the instant case, and there was merely a shifting of credits from the deposit account of Brinson to the bond account of the bank, and there was no basis for attempting to impress the cash in the bank with a trust based upon the bookkeeping credits.

VI.

ARGUMENT.

A. The necessary elements of a preferred claim, and the rule stated as to augmentation and tracing.

Section 5236 United States Revised Statutes, relating to insolvent national banks in receivership, contemplates that the assets thereof shall be distributed pro rata among all of the creditors and claimants. No provision is made in the National Banking Laws for preferred claims. The Courts have, however, established a basis for preferred claims where the claimant can show that the receiver has, among the assets, identifiable property belonging to the claimant. In working out the formula or procedure for establishing such claims, the Federal Courts have held generally that the claimant must show, by the burden of

proof, that from the transaction of the claimant with the bank before suspension the bank received property of the claimant in trust, that the property so received actually augmented the existing assets of the bank by way of adding thereto cash or other property (as distinguished from the addition of a bookkeeping credit) and that the augmented assets, or the proceeds thereof, are traceable into the assets taken over by the receiver. If for example a bank receives an item for collection, and collection is made in the form of cash (as distinguished from the receipt in payment of a check drawn upon the bank) or if a bank receives cash funds in trust for a specific purpose, it is considered that a trust relationship exists in such cases, and that the existing assets of the bank have been augmented or increased by the trust property, and consequently if it can be shown further that said trust property was not dissipated by the bank prior to suspension, but on the contrary the trust funds, or other funds constructively in lieu thereof, were retained by the bank and were taken over by the receiver at suspension, a preferred claim will be allowed. This rule is summarized in the decision of the Circuit Court of Appeals for the Eighth Circuit in *Empire State Surety Company* vs. *Carroll County*, 194 Fed. 593, 603, 604, 606. In that case the bank had improperly received deposits and had fraudulently represented that it was solvent. In stating the applicable principles of law concerning preferred claims, the Court said:

> "This is a suit in equity against the receiver of a national bank to require him to take from the ratable dividends of other creditors of the

bank the requisite amount to pay the county's claim in full. The receiver must make the distribution of the property of this bank in accordance with the provisions of the national banking law. It is the dominant purpose and requirement of that law that, after provision for a redemption of its notes is made, the proceeds of an insolvent national bank shall be equally distributed among its unsecured creditors. So imperative is this provision that it repeals a former act of Congress giving a preference to the United States and annuls a statute of a state giving a preference to deposits of savings banks. Rev. St. sec. 5236 (U. S. Comp. St. 1901, p. 3508); *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 285, 16 Sup. Ct. 502, 40 L. Ed. 700. *National Bank* v. *Colby,* 21 Wall. 609, 613, 614, 22 L. Ed. 687. The burden, therefore, is on the sureties to prove clearly that they are entitled on equitable principles to the preference they seek. They proved that the bank took the deposits of the county and of its other depositors in trust for them respectively. But this was not enough. They were also required to prove that these deposits or their proceeds, or a certain part of them, came to the hands of the receiver, for he is liable to *cestuis que trustent* to pay trust funds in full only to the extent that he receives them.

* * * * * * *

"It is indispensable to the maintenance by a *cestui que* trust of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified

piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the receiver.

* * * * * * *

"But checks of third persons on the bank with which they are deposited which are paid by crediting the bank and charging the drawers on its books fail to increase the cash in its possession and form no basis for a preferential payment to the depositor. *Beard* v. *Independent District of Pella City*, 88 Fed. 375, 382, 31 C. C. A. 562.

"Moreover, the deposit of checks of third persons which are credited to the depositor and used by the bank to pay its debts bring no money into its fund of cash and form no foundation for preferential payment to the depositor. *City Bank* v. *Blackmore*, 75 Fed. 771, 773, 21 C. C. A. 514.

"Again, checks of third parties deposited with a bank credited to the depositor and collected through a clearing house lay no foundation for a preferential payment, in the absence of proof of the actual balance of cash the bank received on account of them, for they may have been and usually are used in whole or in part to discharge the debts of the bank. In re Seven Corners Bank, 58 Minn. 5, 59 N. W. 633; *City of St. Paul* v. *Seymour*, 71 Minn. 303, 308, 74

N. W. 136; *Willoughby* v. *Weinberger*, 15 Okla. 226, 229, 79 Pac. 777.

To the same effect see:

Eighth Circuit:

Larabee Flour Mills v. *First National Bank*, 13 Fed. (2) 330, 331;

Beard v. *Independent District of Pella City*, 88 Fed. 375, 382, 383;

Hirning v. *Federal Reserve Bank*, 52 Fed. (2) 382.

Sixth Circuit:

Brennan v. *Tillinghast*, 201 Fed. 609, 612, 613.

Ninth Circuit:

Titlow v. *McCormick*, 236 Fed. 209, 211, 212.

Tenth Circuit:

Blumenfeld v. *Bank*, 38 Fed. (2) 455.

Second Circuit:

American Can Company v. *Williams*, 178 Fed. 420.

Also see *Schuyler* v. *Littlefield*, 232 U. S. 707, 710, 713; *Cunningham, Trustee of Ponzi* v. *Brown*, 265 U. S. 1, 11; *St. Louis & S. F. R. R.* v. *Spiller*, 274 U. S. 304, 310.

B. The appropriation of a deposit or credit balance does not result in augmentation but merely in a shifting of bookkeeping credits.

The Federal Courts have held generally that the shifting or appropriation of a deposit or credit balance

in a bank, whereby such shifted deposit or credit balance accrues to the bank, either as trustee or otherwise, contributes no additional assets, and creates no additional fund in the bank, and that consequently augmentation of existing assets does not occur. This situation frequently arises where an item has been forwarded to a bank for collection against one of its depositors, and the bank receives in trust in payment of the item a check of the debtor drawn upon his deposit account. In such case a charge is made to the debtor's deposit balance, and a corresponding credit, for remittance purposes, is made in favor of the owner of the item. In such case no new funds accrue to the bank, and there has been merely a shifting of bookkeeping credits, and consequently there has been no augmentation. Under such circumstances a preferred claim cannot be allowed, according to the Federal decisions. In a very recent case in the Eighth Circuit of *Hirning* v. *Federal Reserve Bank*, 52 Fed. (2) 382, the Court, in discussing these principles, said:

> "It is contended by the appellee that the checks sent by the Reserve Bank to the Brookings Bank *constituted a trust fund*, and that this trust fund has been traced into the currency and collection items sent by the Brookings Bank to the Reserve Bank.
>
> The trial court seems to have adopted this view as one of the grounds of its decision in ordering judgment for defendant.

We do not agree with this contention. It must be remembered that the checks sent to the Brookings Bank by the Reserve Bank were all of them checks drawn on the Brookings Bank. When the Brookings Bank accepted the checks, this produced no additional funds in its hands. Its assets were not augmented. *No trust fund was created.* If there was no trust fund, there could, of course, be no tracing of the trust fund into any assets of the Brookings Bank. The doctrine that a trust fund is created when checks drawn on bank A by a depositor therein are sent to bank A by bank B for collection, i. e., for payment, has been disapproved by the decisions in this Circuit, as has also the doctrine that the forwarding bank or its principal has a general lien on the assets of the drawee bank for the payment of such checks. *Rorebeck* v. *Benedict, etc. Co.*, 26 Fed. (2) 440; *Farmers National Bank* v. *Pribble*, 15 Fed. (2) 175; *Larabee Flour Mills* v. *First Nat. Bank*, 13 F. (2) 330; *Macy* v. *Roedenbeck*, 227 Fed. 346, 352; *Beard* v. *Independent Dist.*, 88 Fed. 375."

(Italics inserted.)

To the same effect are the cases in the various Circuits cited in paragraph A next preceding.

C. **There was no augmentation of assets, or tracing to the receiver, in the instant case.**

In the instant case the respondent Brinson had an existing deposit balance of $1,961.31 in the First National Bank of New Bern. He deposited, in regular course in his account, a check for $2,100 drawn on the Eastern Bank and Trust Company and received credit therefor, with the understanding that the bank would purchase approximately $4,000 of Liberty Bonds and

charge his account for the amount thereof when purchased. In the meantime the deposit was to stand to his credit for the full amount. It will be noted that the agreement between the parties contemplated the use of the deposit balance at a future date in the same manner as if at such future date the depositor had drawn a check to the bank for the amount of the contemplated purchase price of the bonds. The situation is, therefore, exactly analogous to the cases cited and quoted, *supra*, where a depositor gives his bank a check on his account in payment of an obligation. As already indicated, no new assets are added to the bank by such transaction, and a shifting of credits or bookkeeping entries only results. In the instant case the bank charged the deposit account of Brinson with $3,964.60 (the contemplated purchase price of the bonds), and credited its bond account with a corresponding amount, thereby shifting the credit from the deposit account of Brinson to the bond account of the bank in trust for Brinson. The assets of the bank, however, were no greater before, than after, the shifting of the deposit credit.

The $2,100 check drawn on the Eastern Bank & Trust Company should, under elementary principles, be considered to have been the property of the bank in that it was deposited in the account of Brinson in the customary manner (R. 19), and although it was expected that the credit thereby resulting would be used in the future for the purchase of bonds, nevertheless in the meantime it stood to his credit and the proceeds should be considered the property of the bank. Assuming, however, for discussion only (but

not conceding), that the $2,100 check must be treated as trust funds, it will be noted that no augmentation of assets of the bank occurred, and no tracing of the proceeds to the receiver can be established. As explained in the summary of facts, *supra*, the clearing of the item, with other items, between the First National Bank and the Eastern Bank & Trust Company, resulted in a balance in favor of the First National Bank of $5,801.09, for which the First National Bank received drafts on a Norfolk bank. The drafts were transmitted to the Norfolk bank for credit of the First National Bank with other items aggregating $11,908.88 (R. 21) and an examination of the account of the Norfolk bank with the First National Bank (R. 22) discloses that although the balance on October 14 was $10,226.12 in favor of the First National Bank, the balance on October 15, after the deposit of the items aggregating $11,908.88 was only $9,413.61, that is to say, the balance in the Norfolk bank after such deposit was, by virtue of withdrawals, less than the balance on October 14. Thereafter successive withdrawals from the account by the First National Bank resulted in an overdraft on October 18 of $5,810.56, thereby conclusively showing that the $2,100 item, included in the item of $5,801.09, which in turn was included in the item of $11,908.88 was entirely dissipated by October 18, so that it is obvious from the record that no part of the proceeds of the $2,100 check could have been taken over by the receiver. As a matter of fact, at the close of business October 25, the account (R. 22) still showed an overdraft against the First National Bank of $970.20.

It seems obvious from the foregoing that the conclusions, as a matter of law, of the Trial Court, and of the Court of Appeals, upon the undisputed facts, that augmentation of assets occurred, was error. Indeed it is evident from the opinion of the Circuit Court of Appeals that not much importance was attached to the factor of augmentation so far as the deposit account or the $2,100 check were concerned, but, as next discussed, the Court held a preferred claim existed regardless of augmentation and tracing.

D. There was no valid basis for attempting to impress the cash in the bank with a trust based upon the transaction with Brinson and the bookkeeping credits resulting therefrom in his favor.

The court below held that irrespective of the factor of augmentation and tracing, the cash in the bank at the time of the transaction with Brinson was impressed with a trust in his favor to the amount necessary to purchase the bonds, and that consequently inasmuch as the bank thereafter at all times had on hand sufficient cash to equal the supposed purchase price of the bonds, a preferred claim existed.

The first reason assigned by the court is that the agreement of the bank to charge the account of Brinson with the purchase price of the bonds must be considered equivalent to the giving of a check by Brinson upon his account, and from this point the court proceeds further and holds that the giving of a check for such purpose and the charging of the same to the account, would have been the same in effect as cashing

the check and immediately giving back to the bank the cash funds to purchase the bonds, and that in such latter case there would be an augmentation of assets as the basis for a preferred claim. The position that the giving of a check by a depositor and the charging of the same to his account is, in legal effect, equivalent to the cashing of the check by the depositor and the delivery of the cash to the bank, is clearly contrary to the whole trend of decisions in the Federal courts other than in the fourth and fifth circuits (as previously noted), in that the other circuits unquestionably hold that the giving of a check by a depositor upon his account and the charging of his account therewith, amounts to no more than a shifting of bookkeeping credits and does not bring in any new cash or assets nor constitute the basis for a preferred claim.

The case of *Davis* v. *McNair,* 48 Fed. (2) 494, in the fifth circuit, and the State cases cited and quoted by the court below in support of this point (R. 34, 35) are, for the reasons hereinbefore stated, contrary to the general trend of the Federal cases established in the other circuits, and contrary to the principles relied upon by this Honorable Court in *Schuyler* v. *Littlefield,* 232 U. S. 707, 710, 711, 712, 713, and *Cunningham, Trustee of Ponzi* v. *Brown,* 265 U. S. 1, 11, and *St. Louis & S. F. R. R.* v. *Spiller,* 274 U. S. 304, 310.

A further basis assigned by the court below is to the effect that the claim of the respondent, Brinson, was not asserted on the ground that the assets of the bank had been augmented but upon

> "an agreement by the bank that a definite amount of the funds in its possession shall be

> held in trust for a specified purpose. In other words, what the record discloses is, not a shifting of credits, but the creation of a trust with respect to funds already in the bank's possession." (R. 36.)

In reply it may be pointed out, in the first place, that paragraph No. 10 of the bill of complaint filed in the District Court does rely upon augmentation (R. 6) and augmentation was an issue in the case (R. 24). In the second place it is to be noted that the record does not disclose an agreement by the bank that "a definite amount of the funds in its possession" shall be held in trust for a specified purpose, but on the contrary the undisputed facts disclose merely an agreement on the part of the bank to purchase the bonds, and when so purchased, to charge the account of the depositor with the price of the same. In the third place it is to be noted that what the record *does* disclose *is* "a shifting of credits", in that a portion of the deposit account or credit of Brinson is shifted to the bond account of the bank. The court points out further, however, that the bank, in charging Brinson's account, and crediting the bond account

> "paid to itself the money necessary for the purchase of the bonds, and charged itself with the same as trustee." (R. 36).

It is obvious that the bank did not, by these bookkeeping entries, pay itself any money, and that the action so taken was merely preliminary to, and in anticipation of, the purchase of the bonds.

E. Breach of trust by the bank cannot, of itself, constitute a basis for a preferred claim.

Assuming (for discussion only, but not conceding it) that the bank was guilty of breach of trust in failing to purchase the bonds, and was guilty of improper conduct in charging Brinson's deposit account and advising him that the bonds had been ordered when they had not been ordered, nevertheless, such misconduct cannot constitute the basis of a preferred claim if there does not coincide augmentation of assets from the transaction, and tracing of the proceeds in actual funds to the receiver. As a matter of fact most preferred claims are based upon some form of breach of trust. In the case of *Schuyler* v. *Littlefield, supra,* certain brokers obtained stock from the preferred claimant by fraudulent representations. The brokers sold the stock, and the owners attempted to establish a preferred claim against the bankruptcy estate of the brokers. In upholding the judgment of the lower court denying a preferred claim, this Honorable Court said as to the obligation upon the preferred claimant, as follows:

> "Like all other persons similarly situated, they were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock their claim must fail. If their evidence left the matter of identification in doubt the doubt must be resolved in favor of the trustee, who represents all of the creditors of Brown & Co., some of whom appear to have suffered in the same way.

Like them, the appellants must be remitted to the general fund."

To the same effect see *Cunningham, Trustee of Ponzi* v. *Brown, supra; St. Louis & S. F. R. R.* v. *Spiller, supra; Empire State Surety Company* v. *Carroll County, supra.*

VII.

CONCLUSION.

It is believed that the foregoing discussion demonstrates that the decision of the court below is contrary to the principles of law established in the circuit courts of appeal in the circuits other than the fourth and fifth circuits, and to the principles established by the decisions of this court. It is earnestly urged, in the interest not only of uniformity in the administration of national banks throughout all of the circuits, but also in the interest of settling conclusively what the law is upon the issues involved, that this court entertain a review of this case on writ of certiorari, and we submit, in the light of the reasons indicated, that the petition should be granted.

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APR 18

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 639

L. J. BLAKEY (Successor to R. E. Schumacher), Receiver of the First National Bank of New Bern, New Bern, North Carolina, Petitioner,

vs.

CHARLES J. BRINSON, Respondent.

BRIEF OF PETITIONER.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 639

L. J. BLAKEY (Successor to R. E. Schumacher), Receiver of the First National Bank of New Bern, New Bern, North Carolina, Petitioner,

vs.

CHARLES J. BRINSON, Respondent.

BRIEF OF PETITIONER.

I.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Fourth Circuit (Parker, Circ. J.) is reported in 52 F. (2) 821, and appears in the record at pages 27 to 31. The judgment of the United States District Court for the Eastern District of North Carolina (Meekins,

D. J.) is not reported but appears in the record at pages 21 to 23.

II.

Jurisdiction.

Writ of certiorari was granted February 23, 1932 (R. 32).

III.

Statement of the Case.

This is an action, removed from a State court to the District Court for the Eastern District of North Carolina (R. 2), wherein the plaintiff Brinson (Respondent here) sued the receiver of the First National Bank of New Bern, New Bern, North Carolina (Petitioner here), to establish a preferred claim against the assets of the bank. The case was heard upon complaint (R. 2), answer (R. 6), and testimony (R. 8-20), resulting in a decree (R. 21) for the plaintiff, which was affirmed (R. 27-32) by the Circuit Court of Appeals for the Fourth Circuit. The Petitioner (Receiver) now seeks a review of the decree of that Court.

The facts in the case are undisputed.

On October 14, 1929, respondent Brinson had a deposit balance of $1,961.31 in a savings account (R. 8, 9) in the First National Bank of New Bern, N. C. (hereinafter called "First Bank"). On that day he deposited in said account (R. 8, 9, P. Ex. 2; R. 16, D. Ex. 3) a check for $2,100 drawn on the Eastern Bank & Trust Company (hereinafter called "Eastern Bank"),

thereby making his deposit balance $4,061.31 (R. 9, P. Ex. 2). At the same time, the First Bank agreed to buy for Brinson Liberty Bonds of a par value of $4,000 (R. 8, 10), the deposit of $2,100 being made to provide sufficient funds in the account for such purchase, the understanding being that the deposit would be charged with the price of the bonds when purchased (R. 8-11; R. 9, P. Ex. 1).

The First Bank included the $2,100 check in its clearing house settlement of October 15 with the Eastern Bank (R. 13-14), which resulted in a balance in favor of the First Bank of $5,801.09 (R. 17), which balance Eastern Bank paid by draft (R. 20). On the same day First Bank forwarded this draft (R. 17, 18) to the Norfolk National Bank of Commerce and Trusts (hereinafter called "Norfolk Bank") for credit to First Bank, the same being included with other items aggregating $11,908.88 (R. 17, 18, 19, 20), and at the same time the First Bank drew and forwarded its own drafts for charge against its account in the Norfolk Bank for $12,739.21 (R. 20), and as the result of these debits and credits in the clearance of the items the balance of the First Bank in the Norfolk Bank was $9,413.61 (R. 19, 20). It is to be noted that whereas the balance in favor of the First Bank on October 14 was $10,226.12 (R. 19, D. Ex. 4), the aforesaid clearing settlement on October 15 (after crediting the $11,908.88 which included the $5,801.09 draft) reduced the balance to $9,413.61 (R. 19, 20). Withdrawals by the First Bank were thereafter made therefrom, resulting in an overdraft of $5,810.56 on October 18, and also a con-

tinuous overdraft at the Norfolk Bank during the last five days before the closing of the First Bank on October 25. At the time of closing, the account was overdrawn $970.23 (R. 19, D. Ex. 4).

On October 19 the cashier of the First Bank advised Brinson that the bonds had been purchased (which was untrue), and that delivery would be made in "eight or ten days" (R. 10). At the same time the cashier delivered to Brinson a memorandum (R. 9, P. Ex. 1) of a charge of $3,964.60 to his account, representing the supposed purchase price of the bonds. The actual charge to Brinson's account was made on October 21, when the bank charged Brinson's account and credited its "Bond Account" with $3,964.60 (R. 9, P. Ex. 2; R. 11, P. Ex. 3; R. 12, P. Ex. 4). No cash was handled or transferred in connection with this transaction. For some reason not explained by the record, the bonds were not ordered or purchased by the First Bank up to the time of suspension. No changes took place in the said bond account after the aforesaid credit transfer (R. 12).

At all times between October 14 and the date of suspension, the actual cash in the vaults of the bank was considerably in excess of $3,964.60 (R. 16, 17).

In answering the suit of Brinson for a preference claim or lien, the Receiver defended on the ground that no trust fund was created in favor of Brinson; that the proceeds of the deposit account of Brinson had not augmented or increased the bank's assets, and that no funds or property identifiable as belonging to the plaintiff could be traced to the cash taken over by the

Receiver at suspension (R. 23-25, Deft's Assignment of Errors). The District Court held that there had been augmentation of the assets of the bank and tracing of the deposit account to the cash in the hands of the Receiver and that a preferred claim should be allowed (R. 22, 23). The Circuit Court of Appeals also held that there was augmentation (R. 28), but that irrespective of augmentation the cash in the bank at the time of the transaction was impressed with a trust for the full amount of the supposed purchase price of the bonds, and it thereupon affirmed the judgment of the District Court and allowed the preferred claim.

IV.

Specification of Errors.

(*a*) The Circuit Court of Appeals erred in holding that the transaction between the respondent Brinson and the insolvent bank resulted in augmentation of the assets of the bank and that the same constituted the basis of a trust in favor of Brinson for $3,964.60 traceable to the assets acquired by the Receiver.

(*b*) The Circuit Court of Appeals erred in holding that, irrespective of augmentation and tracing, the transaction constituted "in effect an agreement by the bank that a definite amount" (R. 30) of the cash in its possession at the time of the transaction would be held in trust for the purpose of purchasing the bonds, and that consequently the funds passing to the Receiver were impressed with a trust in favor of the respondent

Brinson in the sum of $3,964.60, representing the anticipated purchase price of the bonds.

V.

SUMMARY OF ARGUMENT.

A. The unmistakable trend and weight of Federal decisions concerning preferred claims against national banks in receivership clearly establishes: (1) that a preferred claim can exist only where the transaction of the claimant with the bank has resulted in a relationship of trust between the bank and the claimant; (2) that the assets of the bank must have been augmented or increased by new cash or property accruing from the claimant; (3) that the new property can be traced to the assets taken over by the receiver at suspension; (4) that no augmentation or tracing occurs where the transaction results only in a shifting of book-keeping credits, and (5) that no tracing exists where, assuming augmentation, the proceeds of augmentation are entirely dissipated or disbursed prior to suspension of the bank.

Assuming for discussion only that a trust relationship arose, no augmentation or tracing existed in the instant case, and there was merely a shifting of credits from the deposit account of Brinson to the bond account of the bank.

B. No valid basis existed for impressing a trust upon the cash in the bank at the time of the transaction with Brinson, to cover the anticipated purchase price of the bonds, either by reason of any agreement that

such trust should arise, or by construction of the acts of the parties. The only agreement was that the bank would purchase the bonds and charge the purchase price to the deposit account of Brinson. This was not equivalent to cashing a check upon the account and delivering the cash to the bank to pay for the bonds. There was no agreement that a portion of the cash funds of the bank would be segregated to purchase the bonds and no such segregation actually occurred, and consequently no trust arose. Assuming that the action of the bank in charging the deposit account of Brinson and falsely advising him that the bonds had been purchased, was improper, such misconduct would not be sufficient to create a preferred claim.

VI.

ARGUMENT.

A. A preferred claim should not be allowed respondent Brinson because the required elements of trust relationship, augmentation of assets of the bank, and tracing of trust property to the receiver did not exist.

(1) *The Necessary Elements of a Preferred Claim and the Rule Stated as to Augmentation and Tracing.*

The general rule is that distribution of the assets of a national bank must be made in accordance with Section 5236 U. S. R. S. (12 U. S. C., ch. 2, sec. 194), which requires a *pro rata* distribution amongst all creditors. In *Cook County National Bank* v. *United States*, 107 U. S. 445, 450, the Court said, in referring to this section, that it

> "provides for the distribution of the entire assets of the bank, giving no preference to any claim except for moneys to reimburse the United States for advances in redeeming the notes. When this reimbursement is fully provided for, the balance of the assets, as the proceeds are received, is subject to a ratable dividend on all claims proved to the satisfaction of the receiver, or adjudicated by a court of competent jurisdiction."

Except for preferences to the United States the statute contemplates absolute equality among creditors. Preference to the United States is given only for the redemption of circulating notes (referred to in the Cook County case); payment of certified checks given the United States for customs duties (19 U. S. C., Ch. 3, sec. 198), and collection of certain taxes (26 U. S. C., Ch. 3, sec. 109).

The courts have, however, established a basis for another class of preferred claims, namely, where the applicant can show that the receiver has, among the assets acquired by him, identifiable property belonging to the claimant. In working out the formula or procedure for establishing such claims, the Federal courts have held generally that claimant must show, *by the burden of proof,* that from the transaction of the claimant with the bank before suspenison (*a*) the bank received property of the claimant in trust, (*b*) that the property so received actually augmented the existing assets of the bank by way of adding thereto cash or other property (as distinguished from the addition of a bookkeeping credit), and (*c*) that the augmented assets, or the pro-

ceeds thereof, are traceable into the assets taken over by the Receiver. See *Empire State Surety Company* v. *Carroll County, infra.*)

If, for example, a bank receives an item for collection and remittance and collection is made in the form of cash (as distinguished from the receipt in payment of a check drawn upon the bank), it is considered that a trust relationship exists in such cases, and that the existing assets of the bank have been augmented or increased by the trust property; and consequently if it can be shown further that said trust property was not dissipated by the bank prior to suspension, but, on the contrary, the trust funds, or other funds constructively in lieu thereof, were retained by the bank and were taken over by the receiver at suspension, a preferred claim will be allowed.

On the other hand, if a bank receives for collection and remittance an item drawn against one of its depositors, and payment is made by the depositor by giving the bank a check drawn upon his account, the depositor's balance is thereupon charged with the amount of the check and a corresponding credit, for remittance purposes, is made in favor of the owner of the item. In such case no new funds have accrued to the bank, since the cash and physical assets are exactly the same after as before the collection, and there has been merely a shifting of book-keeping credits. Consequently, there has been no augmentation, and under the great weight of Federal decisions a preferred claim cannot be allowed.

The principles referred to in the two next preceding paragraphs are discussed in the opinion of the Circuit Court of Appeals for the Eighth Circuit in the leading case of *Empire State Surety Company* v. *Carroll County*, 194 Fed. 593, 603, 604, 606. In that case the bank, having fraudulently represented that it was solvent, improperly received deposits, and a preferred claim was sought to be established against the subsequently appointed receiver. In stating the applicable principles, the Court said:

> "This is a suit in equity against the receiver of a national bank to require him to take from the ratable dividends of other creditors of the bank the requisite amount to pay the county's claim in full. The receiver must make the distribution of the property of this bank in accordance with the provisions of the national banking law. It is the dominant purpose and requirement of that law that, after provision for a redemption of its notes is made, the proceeds of an insolvent national bank shall be equally distributed among its unsecured creditors. So imperative is this provision that it repeals a former act of Congress giving a preference to the United States and annuls a statute of a state giving a preference to deposits of savings banks. Rev. St. sec. 5236 (U. S. Comp. St. 1901, p. 3508); *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 285, 16 Sup. Ct. 502, 40 L. Ed. 700; *National Bank* v. *Colby*, 21 Wall. 609, 613, 614, 22 L. Ed. 687. The burden, therefore, is on the sureties to prove clearly that they are entitled on equitable principles to the preference they seek. They proved that the bank took the deposits of

the county and of its other depositors in trust for them respectively. *But this was not enough. They were also required to prove that these deposits or their proceeds, or a certain part of them, came to the hands of the receiver, for he is liable to cestuis que trustent to pay trust funds in full only to the extent that he receives them.*

* * * * * * *

"It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the receiver.

* * * * * * *

"But checks of third persons on the bank with which they are deposited *which are paid by crediting the bank and charging the drawers on its books fail to increase the cash in its possession and form no basis for a preferential payment to the depositor. Beard* v. *Independent District of Pella City,* 88 Fed. 375, 382, 31 C. C. A. 562.

"Moreover, the deposit of checks of third persons which are credited to the depositor and used by the bank to pay its debts bring no money into its fund of cash and form no foundation for preferential payment to the depositor. *City Bank* v. *Blackmore*, 75 Fed. 771, 773, 21 C. C. A. 514.

"Again, checks of third parties deposited with a bank credited to the depositor and collected through a clearing house lay no foundation for a preferential payment, in the absence of proof of the actual balance of cash the bank received on account of them, for they may have been and usually are used in whole or in part to discharge the debts of the bank. *In re Seven Corners Bank*, 58 Minn. 5, 59 N. W. 633; *City of St. Paul* v. *Seymour*, 51 Minn. 303, 308, 74 N. W. 136; *Willoughby* v. *Weinberger*, 15 Okla. 226, 229, 79 Pac. 777." (Italics inserted.)

In a recent case in the Circuit Court of Appeals for the Eighth Circuit—*Hirning* v. *Federal Reserve Bank*, 52 Fed. (2) 382, 386—The Court, in discussing these principles, said:

"It is contended by the appellee that the checks sent by the Reserve Bank to the Brookings Bank *constituted a trust fund*, and that this trust fund has been traced into the currency and collection items sent by the Brookings Bank to the Reserve Bank.

The trial court seems to have adopted this view as one of the grounds of its decision in ordering judgment for defendant.

We do not agree with this contention. It must be remembered that the checks sent to the

Brookings Bank by the Reserve Bank were all of them checks drawn on the Brookings Bank. When the Brookings Bank accepted the checks, this produced no additional funds in its hands. Its assets were not augmented. *No trust fund was created.* If there was no trust fund, there could, of course, be no tracing of the trust fund into any assets of the Brookings Bank. The doctrine that a trust fund is created when checks drawn on bank A by a depositor therein are sent to bank A by bank B for collection, *i. e.*, for payment, has been disapproved by the decisions in this Circuit, as has also the doctrine that the forwarding bank or its principal has a general lien on the assets of the drawee bank for the payment of such checks. *Rorebeck* v. *Benedict, etc. Co.*, 26 Fed. (2) 440; *Farmers National Bank* v. *Pribble*, 15 Fed (2) 175; *Larabee Flour Mills* v. *First Nat. Bank*, 13 F. (2) 330; *Macy* v. *Roedenbeck*, 227 Fed. 346, 352; *Beard* v. *Independent Dist.*, 88 Fed. 375." (Italics inserted.)

In the Appendix hereto, on pages 39, 40, will be found other Federal decisions to the same effect in the Eighth Circuit, as well as similar decisions in the Second, Fifth, Sixth, Ninth and Tenth Circuits. In two of these cases certiorari was denied by this Court: *Mechanics and Metals National Bank v. Buchanan*, 12 Fed. (2d) 891 (C. C. A.-8-1926), certiorari denied 273 U. S. 715; *Larabee Flour Mills* v. *First National Bank of Henryetta, Oklahoma*, 13 Fed. (2d) 330 (C. C. A.-8-1926), certiorari denied 273 U. S. 727. This same doctrine of augmentation and tracing is also established by the State Courts of Massachusetts, Michigan, New

Jersey, New York, Pennsylvania, South Carolina, South Dakota, and Washington. (See cases cited in Appendix at pages 40, 41.)

The burden of proof is upon the applicant to establish his claim and trace the proceeds to the receiver or trustee. (See *Schuyler* v. *Littlefield*, 232 U. S. 707, 710, 713; *Cunningham Trustee of Ponzi* v. *Brown*, 265 U. S. 1, 11; *St. Louis & S. F. R. R.* v. *Spiller*, 274 U. S. 304, 310.)

(2) *There Has Been Neither Augmentation nor Tracing to the Receiver in the Instant Case.*

In subdivision B of the Argument, *infra*, we discuss the question of trust relationship, and seek to show that no trust existed in favor of the respondent Brinson. The present discussion will relate primarily to the elements of augmentation and tracing, assuming for discussion only that a trust relationship existed.

In the instant case the respondent Brinson had an existing deposit balance of $1,961.31 in the First National Bank of New Bern. He deposited, in regular course in his account, on October 14, a check for $2,100 drawn on the Eastern Bank and Trust Company and received credit therefor, with the understanding that the bank would purchase approximately $4,000 of Liberty Bonds and charge his account for the amount thereof when purchased. *In the meantime the deposit was to stand to his credit for the full amount.* It will be noted that the agreement between the parties contemplated the use of the deposit balance at a future date in the same manner as if at such future date the

depositor had drawn a check to the bank for the amount of the contemplated purchase price of the bonds. The situation is, therefore, exactly analogous to the cases cited and quoted, *supra*, where a depositor gives his bank a check on his account in payment of an obligation. As already indicated, no new assets are added to the bank by such transaction, and a shifting of credits or book-keeping entries only results. In the instant case the bank charged the deposit account of Brinson with $3,964.60 (the contemplated purchase price of the bonds), on October 21, and credited its bond account with a corresponding amount, thereby shifting the credit from the deposit account of Brinson to the bond account of the bank. The assets of the bank, however, were no greater after, than before, the shifting of the deposit credit.

It may be noted in passing at this point that the $2,100 check drawn on the Eastern Bank and Trust Company should, under elementary principles, be considered to have been the property of the bank in that it was deposited in due course in the account of Brinson in the customary manner, and although it was expected that the credit thereby resulting would be used in the future for the purchase of the bonds, nevertheless, in the meantime *it stood to his credit in his deposit account, and title to the funds it represented was in the bank and a debtor and creditor relation only existed as in other deposit accounts.* Consequently, it would appear that no trust relationship existed as to the same, and, therefore, the question of augmentation and tracing should not, on principle, need to be con-

sidered. The same comment applies to the balance of $1,961.31, which already existed at the time of the deposit of the $2,100 check. The relation of debtor and creditor unquestionably existed as to this amount, and further consideration of the same in this connection is unnecessary.

However, even if it be assumed (but without conceding it) that a trust arose as to the $2,100 check when it was deposited, it is submitted that the same did not ultimately augment or increase the assets of the bank, or, if it be assumed that such augmentation occured, it would appear that the porceeds of the check cannot be traced to the assets acquired by the receiver. As indicated in the statement of facts (*supra*, page 2) the First Bank included the check in its clearing house settlement of October 15 with the Eastern Bank (R. 13-14) resulting in a balance in favor of the First Bank of $5,801.09 (R. 17), which balance the Eastern Bank paid by draft (R. 20). On the same day First Bank forwarded this draft (R. 17, 18) to the Norfolk Bank for credit to the First Bank, the same being included with other items aggregating $11,908.88 (R. 17, 18), and at the same time the First Bank drew and forwarded its own drafts (relating to other matters), for charge against its account in the Norfolk Bank, and, as a result of these debits and credits in the clearance with the Norfolk Bank, the balance of the First Bank in the Norfolk Bank was $9,413.61 (R. 19, 20). It is, therefore, to be noted that, whereas the balance in favor of the First Bank on October 14 was $10,226.12, the clearing settlement of October 15 (even

after crediting the $11,908.88 which included the $5,801.09 draft) reduced the balance to $9,413.61 (R. 19, 20). Hence it is obvious that the use of the $2,100 check did not, on October 15, augment the assets of the bank, the same being used in the clearings to pay its obligations, and, therefore, in this respect the case is governed by *Empire State Surety Company* v. *Carroll County,* 194 Fed. 593, 606 (numbered paragraphs 10 and 11, quoted *supra,* page 12); also see *Farmers' National Bank* v. *Pribble,* 15 Fed. (2) 175.

Assuming, however, that the balance of $9,413.61 did include the credit resulting from the $2,100 check, it is also to be noted that withdrawals by the First Bank were thereafter made, from time to time, resulting in an overdraft of $5,810.56 on October 18, and also a continuous overdraft at the Norfolk Bank during the last five days before the closing of the First Bank on October 25, the overdraft at suspension of the First Bank being $970.23 (R. 19-D. Ex. 4). The rule is *thoroughly settled that the preferred claimant must trace the fund through the correspondent bank into the assets taken over by the receiver, and that the mingling of the trust funds with other funds of the insolvent bank in the hands of the correspondent bank does not produce a lien upon the general assets of the bank, or upon balances with other correspondent banks, or even upon the cash remaining in the vaults of the insolvent bank.* The authorities in this connection appear in the Second, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Federal Circuits, and will be found cited in the

Appendix hereto on pages 42, 43. The record in this case is silent as to the use made by the First Bank of its balances in the Norfolk Bank. All of the same may have been and probably were, used in the payment of the debts of the insolvent bank, and in the absence of a showing as to the disposition of such balances in the correspondent bank, there has been no specific tracing, and a recovery must be refused. *Commercial Nat. Bk.* v. *Armstrong,* 39 Fed. 684, affirmed in 148 U. S. 50 (1893); *Farmers' Nat. Bk. of Burlington* v. *Pribble,* 15 Fed. (2) 175 C. C. A. 8-1926); *First Nat. Bk. of Ventura* v. *Williams,* 15 Fed. (2d) 585 (D. C.-N. C.-1926); *American Can Co.* v. *Williams,* 176 Fed. 816 (C. C. N. Y. 1908), affirmed in 178 Fed. 420 (C. C. A.-2-1910); *Titlow* v. *McCormick,* 236 Fed. 209 (C. C. A.-9-1916); *Wuerpel* v. *Commercial-Germania Trust & Savings Bk.,* 238 Fed. 269 (C. C. A.-5-1917); *Macy* v. *Roedenbeck,* 227 Fed. 346 (C. C. A.-8-1915).

No presumption can be indulged that any of the fund from the correspondent bank reached the insolvent bank, or passed to the receiver. *Titlow* v. *McCormick,* 236 Fed. 209, 214. The burden of tracing the fund is upon the claimant, and once it is dissipated it "cannot be treated as reappearing in sums subsequently deposited to the credit of the same account." *Schuyler* v. *Littlefield,* 232 U. S. 707, 710.

It seems obvious from the foregoing that the respondent Brinson failed to prove the necessary elements of augmentation and tracing as to any part of the claimed fund of $3,964.60, the supposed purchase price of the bonds.

B. No valid basis existed for impressing a trust upon the cash in the bank at the time of the transaction with Brinson, to cover the anticipated purchase price of the bonds, either by reason of any agreement that such trust should arise, or by construction of the acts of the parties. The only agreement was that the bank would purchase the bonds and charge the purchase price to the deposit account of Brinson.

The Court below held that, irrespective of the factors of augmentation and tracing, "the result of the agreement" of the parties was such that "a trust was impressed upon (the cash in the bank) to the extent of the amount necessary to make the purchase" of the bonds (R. 29), and that there was "in effect an agreement by the bank that a definite amount of the funds in its possession shall be held in trust for a specified purpose" (R. 30). For the reasons hereinafter stated it is believed such position cannot be sustained.

1. No Express Trust was Created by Agreement of the Parties.

It is worthy of emphasis that the facts in this case are not in dispute. The divergence of views between the parties relates only to the legal construction to be placed upon such facts.

The fair inference from the facts would certainly appear to indicate clearly that the *only express agreement* between the two parties was that the bank would order the bonds, and that thereafter the purchase price of the same was to be charged against the deposit

account of Brinson. The record does not disclose any express agreement that any portion of the bank's cash funds would be segregated, or that such funds would be impressed with a trust for that purpose. The existence of a trust agreement is entirely inconsistent with the *deposit of the additional* $2,100 *in the savings account of Brinson with the understanding that it should remain on deposit in that account and that the account would later be charged with the purchase price.* Under the principles already discussed (p. 15, *supra*), a debtor and creditor relationship only was established, and title to the deposited funds was intended to be in the bank. The Circuit Court of Appeals at one place in the opinion appears to recognize this when it states:

> "If nothing more had occurred than that the bank had agreed to purchase bonds for him *to be paid for later out of funds on deposit, it may well be that no trust would have arisen.* But something more did occur. The bank charged his account with the price of the bonds and credited its bond account with the amount charged" (R. 30-31).

Manifestly, in view of this, it was considered by the Court, not only that no express trust existed at the time of the deposit on October 14, but that no implied or constructive trust arose at that time. It would seem obvious that the subsequent *ex parte* act of the bank in charging the deposit account and crediting the bond account could not, *per se,* constitute an *express* agreement between the parties for a trust. Consequently if a trust arose at all it must have been a constructive

trust. This question will be discussed in the next portion of the argument.

2. No Constructive Trust Arose from the Acts of the Parties.

(*a*) *A trust cannot exist without a trust res.*

A constructive trust cannot exist unless there is a trust *res, i. e.,* property to which the trust pertains. *American Law Institute, Trusts Restatement,* sec. 70. The theory of tracing trust funds or property necessarily implies that there is a fund or *res* to be followed. *Hirning* v. *Federal Reserve Bank,* 52 Fed. (2) 382, 386. If it be said that the debt owing by the bank to the depositor in the instant case became the trust *res,* the answer is that "an obligor cannot be trustee either of his duties or of the obligee's rights under the obligation." *American Law Institute, Trusts Restatement,* sec. 75, and comment "*a*" and illustration thereto. In discussing a situation analogous to the instant case, Mr. Justice Stone, in Columbia Law Review of June, 1921, Vol. XXI, p. 518, says:

> "The doctrine that money deposited with a bank for a special purpose is a fiduciary deposit, has been carried to extreme lengths in this country in those cases where no specific money was ever paid to the bank, the customer merely giving or procuring a credit in account in favor of the bank upon the banker's undertaking to effect payment at a distant point. Here there is no specific deposit. The transaction results only in a credit appearing on the books of the bank,

there being at no point of time any specific money or other *res* paid to or set apart or held by the bank for account of the customer. *Even if there were an executory undertaking of the bank to become a fiduciary by setting apart such specific sum, such a relationship is not established until there is some actual setting apart or segregation of the money or some other res as the subject matter of the fiduciary relationship.*" (Italics inserted.)

(b) *The charge to the account of respondent and corresponding credit to the bank's bond account was not the equivalent of withdrawing cash and delivering the same in trust.*

The Court below considered that a trust *res* was created by the charge against the deposit account of Brinson, and the corresponding credit of the same to the bank's bond account, in view of the facts that Brinson had sufficient funds in the account to meet the charge, and that as the bank had previously agreed to buy the bonds and charge the account with the purchase price, a trust was impressed upon the bank's cash to the amount necessary to make the purchase (R. 29).

The first reason assigned by the Court (R. 29) is that the agreement of the bank to charge the account of Brinson with the purchase price of the bonds was equivalent to the giving of a check by Brinson upon his account, and that the giving of such a check and the charging of the same to the account would have been the same in effect as cashing the check and immediately giving back to the bank the cash funds to

purchase the bonds, and that in such latter case there would be an augmentation of assets, or trust *res*, as the basis of the preferred claim.

The fact is that no money was withdrawn either by check or otherwise, and only book-keeping entries were made, and the foregoing argument can be supported only by resorting to legal fiction instead of reliance upon the facts.

This argument is specifically answered in *Beard* v. *Independent District of Pella City*, 88 Fed. 375, 381, where a similar contention was made to support a preferred claim. Mr. Justice Shiras, in confuting such reasoning, said:

> "It is claimed in argument that the court must treat the case just as though the treasurer of the school district had presented the check, had obtained the money thereon, and had then deposited the money in the bank as the money of the school district, *but this was not in fact done; and as against the creditors, whose money in fact created the cash amount coming into the hands of the receiver, why should fiction be resorted to in order to sustain a preference* on behalf of the school district to payment out of a fund not augmented in fact by any sum belonging to the district?" (Italics inserted.)

To the same effect is the opinion of Mr. Justice De Courcy in *Hecker-Jones-Jewell Milling Co.* v. *Cosmopolitan Trust Company*, 136 N. E. 333 (Mass.-1922), on 335:

> "The other theory is that the transaction by which the draft was paid was, in legal effect, the

same as if B. Greenglass & Son had drawn from their account through the paying teller the sum of $3,518 in money, and then handed it back to the collecting teller in payment of the draft. *But that is not what the debtor did; and the difference is essential, not a mere matter of form.* The payment made to the bank was not cash, to which the moment before it had not the slightest claim, and which therefore would count as wholly separate 'proceeds' of the collection; it was merely the lessening of one of its own debts, and productive of nothing even remotely suggesting a 'res' for a trust. The difference between the legal significance of the actual and the assumed courses of action cannot be ignored or confused." (Italics inserted.)

A situation very closely analogous to the instant case is reported in *Mark* v. *Westlin*, 48 Fed. (2) 609 (D. C. Minn. 1931, Sanborn, D. J.). In that case the plaintiff arranged with the bank for the purchase of liberty bonds and gave it a withdrawal slip or check upon a savings account for the estimated amount of the bonds. The bank gave her a receipt reading as follows:

> "'Received of Mrs. Ida Mark twenty-five hundred thirty-four dollars, forty-six cents ($2,534.46) for twenty-five hundred ($2,500) dollars in Fourth Liberty Bonds to be registered in the name of Mrs. Ida Mark, Moorhead, Minnesota.'"

A withdrawal entry was made at the time upon her savings account pass-book and the bonds were ordered through the Federal Reserve Bank, but before delivery

was made the bank closed and the bonds were retained by the Reserve Bank. Thereupon the depositor sought to establish a preferred claim. The Court, in discussing the basic principles concerning preferred claims and in specifically refuting the contention that the giving of a check is the same as delivery of cash, said in part as follows:

> (609) "One difficulty which some courts have had in dealing with the question of recovery of funds misapplied by an insolvent bank arises out of a failure to take into consideration the fact that the controversy is not between the claimant and the bank, but between the claimant and the other creditors with respect to a particular fund in the hands of the receiver. * * *
>
> (610) "It is firmly settled by numerous decisions of the courts of this and other circuits that, in order to establish a preferred claim, the claimant must show that the funds of the bank were actually augmented by the transaction under which he claims his right to priority. * * *
>
> "*It is claimed here by the plaintiff that the giving of the withdrawal slip to the assistant cashier was the same as though she had drawn out of the bank that much currency and had then delivered it to the assistant cashier for the purpose of purchasing the Liberty bonds.* There is nothing which Mrs. Mark did which augmented the assets of the bank which came into the hands of the receiver. Its cash assets were contributed by others. Had the withdrawal slip never been drawn, and had no instructions been

> given for the purchase of the bonds, the result would have been the same so far as the receiver is concerned. The other cerditors were in no way benefitted by what Mrs. Mark did. * * *'' (Italics inserted.)

With reference to a similar argument in another type of case, the learned Judge of the lower court said in *First Nat. Bk. of Ventura* v. *Williams*, 15 Fed. (2) 585 (D. C.-N. C.-1926), on 588:

> "Counsel for complainant insists that, but for the labor-saving device of clearing by the exchange of checks, this check would have been collected in cash and the cash which came into the hands of the receiver would have been augmented as a result thereof, and that the fact that the clearance was resorted to should not be allowed to deprive him of the advantage which he would have had under a cash collection. *The answer to this is that courts must decide cases, not upon suppositions, but upon facts as proven or admitted, and the admitted fact is that cash was not received for the check, but that it was used merely to reduce the liabilities of the bank.*'' (Italics inserted.)

Also see, in line with the foregoing Federal decisions, *Miller* v. *Viola State Bank*, 246 Pac. 517, 121 Kans. 193; *Howland* v. *People*, 229 Ill. App. 23; *People of State of New York* v. *The Merchants and Mechanics Bank of Troy*, 78 N. Y. 269.

(*c*) *Analysis of cases relied upon by Court below.*

Davis v. *McNair*, 48 Fed. (2) 494:

The plaintiff, Davis, arranged with his bank to buy for him certain Liberty bonds, and tendered the bank his pass-book and offered to draw out the money for that purpose. He was informed that it was not necessary to draw out the money, and that the bank would purchase the bonds and charge the same to his account. The bonds were purchased but were retained by a correspondent bank, and plaintiff sought, *inter alia,* to establish a preferred claim. The Court held there, as in the instant case, that the relation of the parties was changed from debtor and creditor to a trust relationship, and that the situation was the same as though the plaintiff had actually withdrawn the cash and delivered the same to the bank for the purchase of the bonds, and that in consequence a trust was impressed upon the bank's assets for which a preferred claim should be allowed.

This is the only Federal case cited in this connection by the Court below in support of its position. It is clearly contrary to the principle announced in the Federal cases of *Beard* v. *Independent Dist. of Pella City, supra,* and *Mark* v. *Westlin, supra,* and is a departure from the entire trend of Federal decisions for the reasons hereinbefore discussed. The McNair case relies upon the state decisions of *Goodyear Tire & Rubber Co.* v. *Hanover State Bank,* 109 Kans. 772, 204 Pac. 992; *Northwest Lumber Co.* v. *Scandanavian-Amer. Bank,* 225 Pac. 825, 130 Wash. 33, and *Bryan* v. *Coconut Grove Bank & Trust Co.,* 132 So. 481. These cases hold that the giving of a check and the charging of the same to the deposit account is equivalent to delivery of cash.

They are, of course, at variance with the Federal rule, and the McNair case therefore should not be relied upon as authority.

The case of *State* v. *Exchange Bank of Bristow*, 112 Nebr. 834, 201 N. W. 895, cited by the Court below in the foregoing connection, involved primarily the question of whether or not a certain Certificate of Deposit was within the provision of the State guaranty of deposits law. Incidentally it held that the surrender by the plaintiff of certain certificates of deposit and the receipt of others in lieu thereof was equivalent to the deposit of cash. This is the same in principle in this respect as the state cases above referred to and is not entitled to weight against the Federal rule.

The case of *Northwestern Lumber Company* v. *Scandanavian-American Bank*, 130 Wash. 33, 225 Pac. 825 (cited by the Court below as 226 Pac.), has been discussed in connection with the McNair case, *supra*.

State v. *Grills*, 35 R. I. 70, 85 Atl. 281, 283:

This case is cited by the Court below with particular reference to the theory that the general account of the respondent Brinson was converted into a special deposit. The case relates primarily to the guilt of the defendant under an indictment for embezzlement. Defendant was a private banker and had agreed with a depositor to forward a portion of the deposit to a bank in Italy. The defendant apparently charged the account of the depositor and also gave him a receipt acknowledging the money for transmission, and in addition wrote in the depositor's pass-book "August 3,

1908, Sent to Rome $600." The defendant did not forward the money and did not repay the same to the depositor and was found guilty of embezzlement. As an authority the case would appear to be completely disposed of by the comment of Mr. Justice Stone concerning the same:

> "In *State* v. *Grills*, it was held that the banker by failing to effect the transfer was guilty of embezzlement of a 'special deposit,' *which in fact had never existed in any form except that of a credit on the books of the banker. That the bank could not become fiduciary or trustee of its own obligation to the customer or commit larceny of it would seem not to be an arguable proposition.*" (Italics inserted.) Stone: Some Legal Problems involved in the Transmission of Funds, 21 Col. L. R. 507 on 518 (1921).

The presumption is that every depositor is a general depositor, and and the burden of proof is upon the claimant to show to the contrary (*Northern Sugar Corp.* v. *Thompson*, 13 Fed. (2) 829; *Minard* v. *Watts*, 186 Fed. 245). A special deposit necessarily implies specific property held by the bank as bailee or trustee (*Marine Bank of Chicago* v. *Fulton County Bank*, 69 U. S. 252), and the previous discussion has indicated that no such *corpus* or *res* existed in the instant case.

The case of *In re Gans & Klein*, 14 Fed. (2) 116 (D. C.-Mont.-1926), cited by the Court below in this connection, involved the question of the right of set-off of a going bank, and whether such set-off constituted a preference in bankruptcy; no question of tracing was involved.

The case of *Schumacher* v. *Harriett*, 52 Fed. (2) 817, referred to by the Court below (R. 29) is a companion case to the one at bar. It is based upon the same reasoning adopted in deciding the instant case and of course cannot be considered as authority in support of the conclusion reached by the Court in the instant case that a trust existed regardless of augmentation and tracing.

In conclusion as to this portion of the discussion, it may be pointed out that the position that the giving of a check by a depositor and the charging of the same to his account is, in legal effect, equivalent to the cashing of the check by the depositor, and the delivery of the cash to the bank, clearly cannot be sustained by the Federal decisions, in that as heretofore indicated, the whole trend of such decisions is to the effect that the giving of a check by a depositor and the charging of the same to his account, amounts to no more than a shifting of book-keeping credits and does not bring in new cash or assets, nor constitute the basis for a preferred claim. While there may be found (as indicated by the cases cited in *Davis v. McNair*, and also by the court below in the instant case), decisions holding to the contrary, nevertheless it is thoroughly settled that in case of conflict the Federal decisions must control in determining whether or not a preferred claim may be allowed against an insolvent national bank. See *Palo Alto County* v. *Ulrich*, 201 N. W. 132, 133; *First National Bank of Chicago* v. *Selden*, 120 Fed. 212; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275.

(d) ***Further reasons assigned by court below.***

The court below further states that the claim of Brinson was not asserted

> "on the ground that the assets of the bank had been augmented by a payment made to it,"

and that

> "what the record discloses is not a shifting of credits, but the creation of a trust with respect to funds already in the bank's possession" (R. 30).

In reply it may be pointed out, in the first place, that paragraph No. 10 in the defendant's bill of complaint *does* rely upon augmentation (R. 4), and augmentation was an issue in the case (R. 21). In the second place, it is to be noted that what the record *does* disclose is "a shifting of credits," in that a portion of the deposit account, or credit, of Brinson is shifted to the bond account of the bank.

Finally, the court holds that the bank, in charging Brinson's account, and crediting the bond account,

> "paid to itself the money necessary for the purchase of the bonds, and charged itself with the same as trustee". (R. 31).

It is obvious that the bank did not, by these bookkeeping entries, pay itself any money, and that the action so taken was merely preliminary to, and in anticipation of, the purchase of the bonds. On this point Mr. Justice Stone has said:

> "The very essence of the right of priority over other creditors depends upon the setting

> apart of a particular fund for the benefit of the depositor. There is no basis for giving one depositor a priority over another unless this is an essential part of the transaction." ("Some Legal Problems involved in the Transmission of Funds", 21 Col. L. R. 507, 525.)

By "particular fund", of course, the learned author means an actual fund and not a mere book-keeping transaction. (*Supra* pages 21 and 29—extracts from 21 Columbia Law Review.) To the same effect is *People* v. *Merchants & Mechanics Bank,* 78 N. Y. 269, where a preferred claim was sought to be established against a closed bank, based upon an item collected by the bank by the acceptance of a check of its depositor, the check being charged to the account, and a remittance draft issued, the remittance draft being caught in suspension, and not paid. Counsel for plaintiff there contended (p. 272)

> "that charging the check to the drawer in its account with the bank, and returning the check to the drawer as paid, amounted to a payment of the check and the setting apart of a sufficient amount of the drawer's deposits to cover the check. That by sending the check to the Troy Bank through the mail, the Chemical Bank constituted the Troy Bank its agent to collect the check, and to hold the proceeds and send them to the Chemical Bank. That, consequently, the Troy Bank, having paid the check to itself as agent of the Chemical Bank held the amount so paid on the check, or set apart for its payment, in trust for the Chemical Bank, and the assets of the Troy Bank embraced the amount so held

in trust, and passed to the receiver impressed with that trust." (Italics inserted.)

In overruling this contention the court said:

> "We are unable to concur in the reasoning, or result of this ingenious argument. There was no actual setting apart or appropriation of any specific fund or property of the bank, or of the drawer, for the payment of the check. * * * It (the bank) did not undertake to provide for the check by setting apart or appropriating any particular property or fund for that purpose, but by drawing a draft upon the Metropolitan Bank of New York, and remitting that draft to the Chemical Bank. * * * The learned counsel contends that the Troy Bank was agent of the Chemical Bank to receive payment of the check. Suppose it were, what did it receive as such payment? Simply its own obligation. If anything was set apart by charging up the check, it was only so much of the bank's indebtedness to its depositor. * * * To make this case analogous it would be necessary to show that the Troy Bank had separated from its general assets, and placed in the hands of some depositary, a sum sufficient to pay the check, for the express purpose of being so applied, and that this fund had come to the hands of the receiver in some form. There is no approach in this case to any such state of facts" (pp. 272, 273, 274).

(e) Breach of trust by the bank cannot, of itself, constitute a basis for a preferred claim.

Assuming for discussion only, that the bank was guilty of breach of trust in failing to purchase the

bonds, and was guilty of improper conduct in charging Brinson's deposit account, and in advising him that the bonds had been ordered when they had not been ordered, nevertheless such misconduct can not constitute the basis of a preferred claim unless the other elements of augmentation, and tracing the trust *res* to the receiver, also exist. As a matter of fact, most preferred claims are based upon some form of breach of trust. In the case of Harry Fagan, Receiver of the *First National Bank of Avon Park, Fla.*, v. *Bemory P. Whidden and William O. Jones, Co-Executors,* (U. S. C. C. A., 5th Circuit, No. 6467, decided March 26, 1932, — Fed. (2) —), the national bank falsely and fraudulently stated to the repersentatives of a depositor that the depositor did not have an account at the bank. The existence of the deposit was not discovered until after the bank had closed. Allowance of preferred claim was denied, and in disposing of the case the Court said:

> "That the officers of the bank have acted badly, and that for the damage caused by their fraudulent conduct they may be held personally to account, goes without saying. *It is quite another thing, however, to say that the fraud of an officer of the bank, by which a depositor is prevented from carrying out a purpose to cease being a creditor of the bank converts him from a creditor of the bank into an owner of a specific amount of the bank's funds so that thereafter the bank is, as to that amount, not his debtor, but his trustee.* • • • (Italics inserted.)

> "But this is not to hold that equity will, because a fraud has been committed either by concealing the existence of a deposit or the condition of the bank, set up, in order to enforce it, an agreement for a change from a general to a special deposit which was not in fact made. * * *"

In the case of *Schuyler v. Littlefield, supra,* certain brokers obtained stock from the preferred claimant by fraudulent representations. The brokers sold the stock, and the owners attempted to establish a preferred claim against the bankruptcy estate of the brokers. In upholding the judgment of the lower court denying a preferred claim, this Honorable Court said as to the obligation upon the preferred claimant:

> "Like all other persons similarly situated, they were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock their claim must fail. If their evidence left the matter of identification in doubt the doubt must be resolved in favor of the trustee, who represents all of the creditors of Brown & Co., some of whom appear to have suffered in the same way. Like them, the appellants must be remitted to the general fund" (p. 713).

To the same effect see *Cunningham, Trustee of Ponzi,* v. *Brown, supra; St. Louis & S. F. R. R.* v. *Spiller, supra; Empire State Surety Company* v. *Carroll County, supra.*

VI.

Conclusion.

It is believed that the foregoing discussion indicates that no express trust arose in the present case; that no implied or constructive trust arose; that, assuming a trust was created, no augmentation of the bank's assets occurred, and no trust res can be traced to the assets acquired by the receiver; that the lower court's ruling is directly contrary to the view prevailing in the Federal Courts; and that an affirmance may be construed to mean the overruling of the great body of Federal decisions requiring the existence of a trust res and the tracing of the same to the receiver.

It may well be doubted that there is a sound basis for allowing any preferred claims against insolvent national banks in receivership other than those permitted to the United States by express statutory provision (*supra*, page 8). Certainly it would appear to have been the intention of Congress that all other creditors should share upon a pro rata basis in the distribution of assets. *Cook County National Bank* v. *United States*, 107 U. S. 445-450 (quotation, *supra*, page 8); *Davis* v. *Elmira Savings Bank*, 161 U. S. 275. It would appear to be an entirely artificial, rather than a practical distinction, to differentiate between the status of general creditors who deposit their money with a bank, and others who, while they may not leave their funds on general deposit, nevertheless deliver to the bank their funds, or items representing funds, for some special purpose involving the handling and disburse-

ment by the bank of such funds. Such special depositor relies upon the credit of the bank just as much as does the general depositor, and undoubtedly contemplates, as a practical matter of everyday banking custom, that the funds on special deposit will be commingled by the bank with its other funds. It is not expected by such special depositor, in the absence of express provision to the contrary, that the identical funds left by him will be disbursed or remitted by the bank (see general discussion by Mr. Justice Stone, Vol. 21, Columbia Law Review, June, 1921, pages 507-525). The basis for dealing with the bank in each case being identical, to wit: the credit and reliability of the bank, it would seem only just that the special depositor should have no preference over the general depositor, particularly in view of the fact that were it not for the support furnished by the general depositor the bank could not function and could not render the special services desired by the special depositor. Thus, that learned scholar, F. W. Maitland, has said (Maitland, Equity, p. 175):

> "I have great doubts of the convenience of all this. It may be hard that a *cestui que* trust should not have 'his' property, but it is also hard that creditors should go unpaid. Courts of equity, which in this matter have had the upper hand, have thought a great deal of the *cestui que* trust, much less of creditors."

It is seriously suggested that it would not be inappropriate for this Court, at this time, to lay down the

principle that there shall be no preferred claims against national banks under existing law.

It is submitted that the decision of the lower court should be reversed.

Respectfully submitted,

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APPENDIX.

I.

Decisions in the Federal courts wherein actual augmentation (as distinguished from bookkeeping transfers) was required.

Second Circuit:

American Can Co. v. *Williams*, 176 Fed. 816 (C. C.-N. Y.-1908), affirmed in 178 Fed. 420 (C. C. A.-2-1910).

Fifth Circuit:

Merchants & Farmers Bank v. *Austin*, 48 Fed. 25 (C. C.-Ala.-1891);

Anheuser-Busch Brewing Assn. v. *Clayton*, 56 Fed. 759 (C. C. A.-5-1893);

City of Miami v. *First National Bank of St. Petersburg*, 50 F. (2) 267 (D. C.-Fla.-1931);

Larabee Flour Mills Co. v. *First Nat. Bk. of Dublin*, 52 F. (2) 146 (D. C.-Ga.-1931).

Sixth Circuit:

Brennan v. *Tillinghast*, 201 Fed. 609-612, 613.

Eighth Circuit:

Beard v. *Independent District of Pella City*, 88 Fed. 375 (C. C. A.-8-1898), affirming 83 Fed. 5;

Lucas County v. *Jamison*, 170 Fed. 338 (C. C.-Ia.-1908);

Mechanics & Metals Nat. Bk. v. *Buchanan*, 12 F. (2) 891 (C. C. A.-8-1926), cert. den. 273 U. S. 715 (1926);

Larabee Flour Mills v. *First Nat. Bk. of Henryetta, Okla.*, 13 F. (2) 330 (C. C. A.-8-1926), cert. den. 273 U. S. 727 (1926);

Rorebeck v. *Benedict Flour & Feed Co.*, 26 F. (2) 440 (C. C. A.-8-1928);
Burnes Nat. Bk. of St. Joseph, Mo. v. *Spurway*; 28 F. (2) 40 (D. C.-Ia.-1928);
Steele Briggs Seed Co. v. *Spurway*, 28 F. (2) 42 (D. C.-Ia.-1928);
Mark v. *Westlin*, 48 F. (2) 609 (D. C.-Minn.-1931).

Ninth Circuit:

Nyssa Arcadia Drainage Dist. v. *First Nat. Bk. of Vale*, 3 F. (2) 648 (D. C.-Ore.-1925).
Titlow v. *McCormick*, 236 Fed. 209.

Tenth Circuit:

Blumenfeld v. *Bank*, 38 Fed. (2) 455.

II.

Decisions in the State courts wherein actual augmentation (as distinguished from bookkeeping transfers) was required.

Massachusetts:

Hecker-Jones-Jewell Milling Co. v. *Cosmopolitan Trust Co.*, 136 N. E. 333 (1922).

Michigan:

Sherwood v. *Milford State Bank*, 53 N. W. 923 (1892);
Sunderlin v. *Mecosta County Sav. Bk.*, 74 N. W. 478 (1898).

New Jersey:

Perth Amboy Gaslight Co. v. *Middlesex County Bank*, 45 Atl. 704 (1900).

New York:

People v. *Merchants & Mechanics Bank of Troy*, 78 N. Y. 269 (1879);
Frank v. *Bingham*, 12 N. Y. S. 767 (1891).
(*People* v. *City Bank of Rochester*, 96 N. Y. 32 (1884), seems to be disapproved of, and *In re Jayne & Mason*, 251 N. Y. S. 768 (1931), seems to be based on a statute).

Pennsylvania:

Freiberg v. *Stoddart*, 161 Pa. 259 (1894);
Commonwealth ex rel. v. *State Bank of Pittsburgh*, 216 Pa. 124 (1906).

South Carolina:

Citizens Bank of Pinewood v. *Bradley*, 134 S. E. 510 (1926);
Ex parte Wachovia Bk. & Tr. Co., 158 S. E. 214 (1931).

South Dakota:

Hornick, More & Porterfield v. *Farmers & Merchants Bk.*, 227 N. W. 375 (1929);
Milligan v. *First State Bk. of Barnard*, 226 N. W. 747 (1929).

Washington:

Zimmerli v. *Northern Bk. & Tr. Co.*, 191 Pac. 788 (1920);
But compare *Northwest Lbr. Co.* v. *Scandinavian-American Bk. of Seattle*, 225 Pac. 825 (Wash.-1924).

III.

Decisions in the Federal courts involving the mingling of trust funds with balances in correspondent banks, insisting upon specific following and negativing any idea of a general lien.

Second Circuit:

American Can Co. v. *Williams*, 176 Fed. 816 (C. C.-N. Y.-1908), affirmed in 178 Fed. 420 (C. C. A.-2-1910).

Fourth Circuit:

Marshburn v. *Williams*, 15 F. (2) 589 (D. C.-N. C.-1926);
Ellerbe v. *Studebaker Corporation of America*, 21 F. (2) 993 (C. C. A.-4-1927).

Fifth Circuit:

Clark Sparks & Sons Mule & Horse Co. v. *Americus Nat. Bk.*, 230 Fed. 738 (D. C.-Ga.-1916);
Washington Loan & Banking Co. v. *Fourth Nat. Bk. of Macon*, 38 F. (2) 772 (C. C. A.-5-1930);
Sanders v. *Stevens*, 51 F. (2) 743 (D. C.-Miss.-1931).

Sixth Circuit:

Board of Commissioners of Crawford County v. *Patterson*, 149 Fed. 229 (C. C.-Ohio-1906), affirmed in *same* v. *Strawn*, 157 Fed. 49 (C. C. A.-6-1907);
Brennan v. *Tillinghast*, 201 Fed. 609 (C. C. A.-6-1913).

Eighth Circuit:

Lucas County v. *Jamison*, 170 Fed. 338 (C. C.-Ia.-1908);
Macy v. *Roedenbeck*, 227 Fed. 346 (C. C. A.-8-1915);
State Bank of Winfield v. *Alva Security Bk.*, 232 Fed. 847 (C. C. A.-8-1916);
Dudley v. *Richards*, 18 F. (2) 876 (C. C. A.-8-1927);
Bartholf v. *Millett*, 22 F. (2) 538 (C. C. A.-8-1927);
Gwynn v. *Spurway*, 28 F. (2) 37 (D. C.-Ia.-1928);
Cuttell v. *Fluent*, 51 F. (2) 974 (C. C. A.-8-1931).

Ninth Circuit:

Titlow v. *McCormick*, 236 Fed. 209 (C. C. A.-9-1916);
United States Nat. Bk. of Centralia v. *City of Centralia*, 240 Fed. 93 (C. C. A.-9-1917), cert. den. sub. nom. *City of Centralia* v. *Titlow*, 243 U. S. 656 (1917);
First Nat. Bk. of Forsyth v. *Fidelity & Deposit Co.*, 48 F. (2) 585 (C. C. A.-9-1931).

Tenth Circuit:

Anadarko Cotton Oil Co. v. *Litteer*, 300 Fed. 222 (D. C.-Okla.-1924);
Dickson v. *First Nat. Bk. of Buffalo, Okla.*, 26 F. (2) 411 (C. C. A.-8-1928).

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 639

L. J. BLAKEY (SUCCESSOR TO R. E. SCHUMACHER), RECEIVER OF THE FIRST NATIONAL BANK OF NEW BERN, NEW BERN, NORTH CAROLINA, PETITIONER,

vs.

CHARLES J. BRINSON.

BRIEF OF RESPONDENT.

L. I. MOORE,
Counsel for Petitioner.

MOORE & DUNN,
Of Counsel.

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2 Pomeroy's Equity Jurisprudence, p. 1058	12

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 639

L. J. BLAKEY (Successor to R. E. Schumacher), Receiver of the First National Bank of New Bern, New Bern, North Carolina, Petitioner,

vs.

CHARLES J. BRINSON, Respondent.

BRIEF OF CHARLES J. BRINSON, RESPONDENT, ON THE WRIT OF CERTIORARI.

The respondent in this case has not had the advantage of any brief by the petitioner except such as was filed on the petition for certiorari, which writ was granted by the Court upon the application of the petitioner.

Statement of Facts Involved.

This cause was heard by the judge of the United States District Court, who, from the evidence intro-

duced before him, found the facts, and for a statement of facts the respondent quotes from the decree of the District Court and the opinion of the United States Circuit Court of Appeals.

His Honor I. M. Meekins in his decree (Record, page 22) stated the facts found by him, as follows:

> "That on or about the nineteenth day of October 1929, the plaintiff delivered to the said First National Bank of New Bern Thirty-nine Hundred Sixty-four and 60/100 ($3,964.60) Dollars in cash, or its equivalent, and directed and requested the said First National Bank to buy for him and for his account four thousand dollars in par value of United States Government bonds, Fourth Liberty Loan 4¼%, to be registered bonds in his name, and the said Bank undertook and agreed to accept and did accept said money for the purchase of such bonds for the plaintiff, and wrongfully failed and neglected to do so but commingled said funds with other funds in said Bank, advising the plaintiff that the bonds had been purchased in accordance with his directions and would be received in a few days, and continued to hold the plaintiff's money so commingled with the other funds in said Bank until the said First National Bank was closed and placed in the hands of the defendant Receiver on or about the twenty-sixth day of October, 1929; the said sum of Thirty-nine Hundred and Sixty-four and 60/100 ($3,964.60) Dollars so placed in said Bank and wrongfully commingled and misapplied, was delivered to said Bank under the expressed direction and agreement for the purchase of the bonds aforesaid for the plaintiff and for no other purpose, and after

said money was so accepted by the Bank, it did not order or deliver the bonds to the plaintiff, and that the assets of said bank were increased and augmented by plaintiff's money to the full extent of Thirty-nine Hundred Sixty-four and 60/100 ($3,964.60) Dollars.

"That after the moneys of the plaintiff was so placed in the Bank for the purpose aforesaid and wrongfully and unlawfully commingled by the said Bank with its other funds, the said Bank at all times thereafter until it was closed and placed in the hands of the defendant Receiver, had more than sufficient cash on hand to pay the amount due the plaintiff and at the time the Receiver took charge of said Bank, took and accepted among the assets of said Bank more than sufficient amount in cash to pay the amount due to the plaintiff, and still has from the assets of said bank more than a sufficient sum in cash to pay the same."

His Honor Judge Parker, in the opinion of the Circuit Court of Appeals, from the record, stated the facts as follows:

"The facts are that the failed bank was engaged in the business of purchasing bonds for its customers and kept a regular account of funds delivered to it for that purpose. On October 10, 1929, complainant arranged with the officials of the bank to purchase bonds for him and was advised to bring in the necessary money and they would be purchased. He already had $1,961.31 on deposit to his credit and on October 14th, to provide the additional funds necessary, he deposited to his account $2,100.00 in the form of a check drawn on the Eastern Bank & Trust

Company. On October 19th he was notified that his account had been charged with $3,964.60 for the purchase of the bonds, and the records of the bank show that his account was actually charged with this amount on October 21st, and that on the same date the bond account was credited with a deposit of a like amount. The bonds were never in fact purchased, and the bank closed its doors on October 26th.

"At the time of the closing of the bank its cash and cash items amounted to $27,063.98 of which $14,658.18 was actual cash. On October 14th cash and cash items were $44,947.46 and cash $22,831.13. On October 19th they were $32,589.51 and $15,982.54 respectively. On October 21st they were $42,232.39 and $22,246.43. At no time during the period in question did cash and cash items fall below $27,000.00 or actual cash below $14,000.00.

"With respect to the $2,100.00 check drawn by plaintiff on the Eastern Bank & Trust Company, it appears that this was used by the failed bank in a clearance on October 15th, in which the failed bank received from the Eastern Bank & Trust Company $5,801.09 over and above the items which that bank presented against it. This $5,801.09 was in turn used by the failed bank in clearing with the Bank of Commerce & Trusts of Norfolk, and its balance with that bank, after the clearance, was exceeding $10,000.00."

Upon the foregoing facts, the District Court found that the fund belonging to the plaintiff was a special deposit in trust for the purpose declared and directed the receiver to pay the same in full out of the funds coming into his hands.

The Circuit Court of Appeals held "it would seem clear that as a result of the deposit by the plaintiff of the $2,100.00 check the assets of the failed bank were augmented by that amount at the time; but we need not go into this matter, as we are satisfied that upon an entirely different principle complainant is entitled to the relief which he seeks."

ARGUMENT.

The brief on the application for the writ of certiorari in this cause apparently misconceives the decision of the Circuit Court of Appeals for the Fourth Circuit, and in the specification of errors in the summary of argument apparently rests upon a theory not in accord with the facts of this case and not justified by the decision of the Circuit Court of Appeals, the Court in its opinion stating:

> "It should be noted that we are not dealing with a trust asserted on the ground that the assets of the bank have been augmented by a payment made to it. * * * What we have is in effect an agreement by the bank that a definite amount of the funds in its possession shall be held in trust for a specified purpose. *In other words, what the record discloses is, not a shifting of credits, but the creation of a trust with respect to funds already in the bank's possession.*" (Italics ours.)

I.

The decision of the Circuit Court of Appeals is in accord with the decisions of this Court and with the opinions of a large majority of the decisions of the Circuit Courts of Appeals and of the Supreme Courts of several States.

Quoting from the opinion of the Circuit Court of Appeals in this case:

> "There can be no question but that if complainant had actually paid over the cash necessary to purchase the bonds, the bank would have taken the same as a trust fund and if it had mingled same with the cash in its vaults, the whole would have been impressed with a trust in favor of complainant to the extent of the trust fund received. * * * It can make no difference that, instead of cashing a check and then delivering the money to the bank for the purchase of the bonds, he allowed his account to be charged with the amount necessary. The bank had on hand funds more than sufficient for the purpose, and by the agreement with complainant they were impressed with a trust in his favor."

Where there is a deposit in a bank for a specific purpose, it is universally held that the money thus deposited must be applied to the purposes for which it was deposited. *It cannot be diverted therefrom. Southern Exchange Bank* v. *Polk,* 152 Ga. 162; *Eshbach* v. *Byers,* 164 Ill. App. 449; *Wilson* v. *Dawson,* 52 Ind. 513; *Dolph* v. *Cross,* 153 Iowa 289; *Bank* v. *Barger* (Ky.), 115 Southwestern 726; *State Bank* v.

Wehrli, 68 Neb. 75; *Strauss* v. *Tradesman's National Bank*, 36 Hun. (N. Y.) 451; *Page* v. *Springfield National Bank*, 12 Ohio App. 196; *Foscue* v. *National Bank* (Tex.), 210 Southwestern 555; *Hitt Fireworks Company* v. *Scandinavian-American Bank*, 114 Wash. 167; *Union Trust & Savings Bank* v. *Southern Traction Co.*, 283 Federal 50; *Corporation Commission* v. *Trust Company*, 193 N. C. 699.

In the case of *Morton* v. *Woolery* (N. D.), 189 Northwestern 232, 24 A. L. R. page 1109, the Court says:

> "Where money is deposited for a special purpose, as, for instance, in this case where it was deposited for the stated purpose of meeting certain checks to be thereafter drawn against such deposit, the deposit does not become a general one but the bank, upon accepting the deposit, becomes bound by the conditions imposed, and, if it fails to apply the money at all or misapplies it, it can be recovered as a trust deposit. *Hitt Fireworks Company* v. *Bank*, 114 Wash. 167; *Dolph* v. *Cross*, 153 Iowa 289; *Smith* v. *Sanborn*, 247 Iowa 640; *Russell* v. *Bank*, 31 Idaho 59; *Bank* v. *Miller*, 46 N. D. 551; 7 *C. J.* 632."

In the case of *Smith* v. *Sanborn*, 247 Iowa 640, the Court says:

> "Of the general rule that a Bank to whom a depositor is owing a matured indebtedness may appropriate a general deposit of its debtor to the discharge of the obligation, there can be no doubt. * * * but it is no less certain that a deposit made for a special purpose or under a special agreement cannot rightfully be so ap-

> propriated (citing cases). Indeed the proposition that the Bank enjoys no exemption from the general rule by which every party to a business transaction or agreement is legally bound to respect the obligation of its contract, is one which ought to require neither argument or citation of authority. The evidence shows without dispute that the check for $200.00 was placed with the defendant upon the express agreement and understanding that, after paying certain specifically named debts, the remainder would be repaid to the plaintiff on the following day, or whenever called for, to enable him to take his wife to the hospital for needed treatment. Upon money so received, no lien attached in favor of the bank and its attempt to appropriate the same was wholly without right or authority."

Quoting further from the opinion of the Circuit Court of Appeals in this case:

> "It can make no difference that, instead of cashing a check and then delivering the money to the bank for the purchase of the bonds, he allowed his account to be charged with the amount necessary. The bank had on hand funds more than sufficient for the purpose, and by the agreement with complainant they were impressed with a trust in his favor. *Davis* v. *McNair* (C. C. A. 5th), 48 Fed. (2d) 494; *State* v. *Grills*, 35 R. I. 70; *Lumber Company* v. *Scandinavian-American Bank*, 130 Wash. 33; *State* v. *Exchange Bank of Bristow*, 112 Neb. 834.
>
> "In *State* v. *Grills, supra*, the rule applicable in such case is well stated as follows:
>
> "'The ordinary relation of a banker and his customer is that of debtor and creditor as to

the deposits made by the customer with the banker. This relation, arising upon a general deposit, may be changed as to the whole or a part of such general deposit. Without actual delivery to the customer, and a redeposit by him for a special purpose, such general deposit by agreement may be converted into a special deposit and become a fund in the hands of the banker with which he is intrusted for the specific purpose named in the agreement creating the special deposit. Such fund is impressed with a trust, the violation of which is a fraud.'

"The reason underlying the rule is that, by agreement between the parties, a general deposit may be converted into a special deposit (Morse on Banks and Banking, 6th Ed. vol. 1, sec. 188, p. 575), and that a special deposit is in the nature of a trust toward which the bank occupies the position of a trustee. *In re Gans & Klein*, 14 Fed. (2d) 116, 117; *Morse on Banks & Banking*, 6th Ed., vol. 1, sec. 325, p. 757; 3 R. C. L. 558."

In the case of *Lumber Company* v. *Scandinavian-American Bank, supra*, it is said:

"A special deposit on the other hand is where a depositor leaves his money with the bank for a particular purpose or for a particular use. It does not create the relation of a debtor and creditor, but rather that of trustee and *cestui que* trust. The banker obtains no title to the money and may not use it for its own purpose; his obligation being to apply it to the use and purpose for which he receives it. The distinction between the two forms of deposit is a wide one, not only as it affects the immediate parties

thereto, but as it affects other creditors of the bank. On the insolvency of the bank, all of its general depositors have an equal lien on its general assets and can have a return of no more than their proportionate share, while the special depositor may reclaim his entire deposit, if it is found intact, or, under the modern modification of the rule, may reclaim it from the general mass with which it has been commingled, if it appears that the bank has not, subsequent to the time of the commingling reduced the mass to an amount less than the amount of the special deposit. * * * Tested by the rule above stated, it is at once apparent that had the Lumber Company, instead of sending its check to the bank for the amount due on the interest payment, sent to the bank the cash for the amount due, it would, under the circumstances shown, have constituted a special deposit which it could have reclaimed in its entirety after the bank passed into the hands of the Supervisor of Banks, and this, notwithstanding, the bank might have commingled the money with its general cash deposits. A like result would have followed had the Lumber Company required its messenger carrying the check to the bank, to exact payment of the check, and, after payment leave the money so received with the bank as a deposit to pay the matured interest obligation when it became due. The difference between the transactions such as this and the transaction in question, it seems clear, is one of manner rather than one of legal effect. By presenting the check to the bank and directing what distinction should be made of the fund represented by it, the Lumber Company sought

to collect its part of the debt due it from the bank, and deposit the fund for a special purpose. In other words, it sought thereby to change a part of its general deposit into a special deposit. The bank by accepting the check with knowledge of the purpose of the Lumber Company, consented to the change. It thereby lost its right of general lien on the fund, its right of off-set against it, its title thereto, its right to use it for its own purpose, and had no right with respect to it, other than to pay it out in accordance with the directions of the Lumber Company. While the Lumber Company could have changed its terms with respect to the fund prior to its actual disposition in accordance with the directions given, the Bank had no such right. Its sole right and duty was to carry out the instructions given it by the Lumber Company. It follows from these considerations, we think, that the relation of the parties with respect to the fund were changed by the transaction between them; that their relation thereafter with respect to it was not that of debtor and creditor but that of trustee and *cestui que* trust. As between the immediate parties thereto, we conclude that it cannot be successfully contended that the lumber company was not entitled to claim the fund as a special deposit."

As a general rule, if property is converted and the trust fund can be traced, the *cestui que* trust may resort to a court of equity to compel its transfer to himself, and his right will not be affected by any change in the trust property brought about by the trustee without his consent, unless it has been transferred to

a *bona fide* purchaser or assignee for value and without notice. 2 *Pomeroy's Equity Jurisprudence,* 1058; *Barnard* v. *Hawks,* 111 N. C. 333.

The manner in which a bank has treated the funds, mingling them with its own money, does not affect the plaintiff's right to claim the amount from the funds on hand. The doctrine seems to be that where a wrongdoer knowingly commingles the property of another in such a manner that it becomes indistinguishable, the true owner may claim the whole mass, or, if it has been disposed of, may follow it or its proceeds, as the case may be, as long as he can trace it for the purpose of fixing an equitable lien on the property of which he has thus been dispossessed. *Peek* v. *Elliott,* 30 Kan. 156; *Kemphill* v. *Dickson,* 49 A. S. R. 869.

The case of *Titlow* v. *Sundquist,* in the Circuit Court of Appeals from the 9th Circuit, 234 Federal, page 613, was an action brought against a receiver of a national bank to recover $1,296.00 alleged to have been deposited by the plaintiff in the action with the defendant bank under an express agreement between the parties that the bank would pay it to one Smith in satisfaction of a note executed to her by one Gustafson for $1,200.00, upon which there was also then due $96.00 in interest, secured by a mortgage upon certain land. In that case, the Court held:

> "Manifestly the $1,296.00 left by Sundquist with the Bank, of which the Appellant is Receiver, to be paid over to Mrs. Smith upon her cancellation of the note and mortgage executed to her by Gustafson, was not of the latter character, but on the contrary, was deposited with

the bank for the specific purpose and under the express agreement of the bank to execute the purpose. It was in no sense a loan by Sundquist to the bank of $1,296.00, and the Bank did not owe him that sum or any other amount by reason of that transaction, but held it in trust for the purpose stated. The obvious result is that it did not pass to the general creditors of the insolvent bank, and on the failure of the latter to execute the trust for whatever reason, the owner of the money is legally and justly entitled to its recovery."

A case directly in point is that of *Montague and Others* v. *Pacific Bank and Others* (C. C.), decided by Judge Morrow and reported in 81 Federal 602, where a number of authorities are cited in support of his conclusion, which need not be repeated here.

In the case of *Dugan* v. *Security Savings Bank of Perry*, 217 N. W. (Idaho) 831, it is held:

"Where the holder of a certificate of deposit covering amount of premium on the bond deposited with the bank pending the delivery of the bond, demanded payment before the bank closed its doors and was induced to leave such an amount in the bank on a special deposit under an agreement to that effect, there was a trust relationship established between the bank and such depositor as bearing on the right to a preference after the insolvency of the bank. Where the holder of a certificate of deposit evidencing premium on the bond pending the issuance thereof demanded payment and was induced to leave the amount in the bank on special deposit, the funds of the bank were augmented

> to the extent of such deposit as affecting the right to a preference after insolvency, although and instead of actually receiving the cash, the bank's obligation to hold such an amount on special deposit was accepted."

To the same effect is *Evans* v. *Peoples Bank of Meadville* (Mo.), 6 Southwestern (2d) 655, where the plaintiff had drawn checks against her checking account for $8,000 and delivered the same to the bank's cashier with directions to invest the amount in Government bonds. The cashier invested half the amount in Government bonds and purchased a time certificate of deposit for the balance. The bank became insolvent. The bonds purchased for the plaintiff's account were delivered to her and she sued to establish a preference for the balance of the eight thousand dollars and her right to the preference was maintained.

The authorities on this position might be multiplied, but it seems to us these authorities clearly establish the principle announced in the opinion of the Circuit Court of Appeals. The distinction between general and special deposits is recognized by this Court in the case of *Marine Bank* v. *Fulton Bank*, 2 Wall 252, in which the Court says:

> "All deposits made with banks may be divided into two classes, namely, those in which the bank becomes a bailee of the depositor, the title to the thing deposited remaining with the latter, and that other kind of deposit of money peculiar in banking business in which the depositor for his own convenience, parts with the title to his money and loans it to the bank."

And this doctrine has been approved in several more recent decisions of this Court as well as in numerous cases in the Circuit Court of Appeals.

Montague v. *Pacific Bank, supra.*

Moreland v. *Brown,* 86 Federal 259 (C. C. A.).

Merchants National Bank v. *School District,* 94 Fed. (C. C. A.) 708.

Davis v. *McNair* (C. C. A.), 48 Fed. (2d) 494.

Schumacher v. *Harriett* (C. C. A.), 52 Federal (2d) 817.

Bartholf v. *Millett* (C. C. A., 8th), 22 Fed. (2d) 538.

In the case of *Emigh* v. *Earling,* 218 U. S. 27, this Court says:

> "No authority has been cited and we think none can be found to deny the power of a banking corporation to disgorge the property of another which it had got into its possession by any means whatever under the duty to disgorge. It may have had ~~no~~ legal power to take the step by which the money of this plaintiff's assignor came into its hands, but having taken such steps to obtain their money, no such absurdity exists as a legal obstacle to its surrendering it. It would be a reproach to the law to hold any such doctrine of inequity."

And, further, in the case of *Merchants National Bank of Hellena* v. *School District* #8, 94 Federal (C. C. A.) 705, it is said:

> "Neither a bank nor its Receiver can deny the receipt of money deposited with the bank as a

> trust fund *on the ground that no money was actually deposited* where it received and accepted credit for the amount with correspondents and received the money thereon in due course of business."

It being established that the money of the respondent in this case constituted a special deposit for a special purpose, as is uncontradicted by the evidence, we can find no authority and no justification for the refusal of the receiver to restore the money to the person to whom it of right belongs; and the matter of augmentation of assets does not arise, and the authorities cited by the petitioner upon these questions, all of which rest upon an entirely different state of facts and are not pertinent to the case under consideration.

It is contended that the decision of the Circuit Court of Appeals for the Fourth Circuit should be reviewed and reversed:

(*a*) For the reason that the same is in conflict with the principles of law established in similar cases in this Court, and upon this proposition is cited three United States decisions, neither one of which, we respectfully submit, are applicable to the case under consideration.

In the case of *Schuyler* v. *Littlefield*, 232 U. S. 707, this was a matter in bankruptcy, and the question there involved was wholly dissimilar, both in fact and in law, from the point under consideration in this appeal. In that case Brown & Company, by misrepresentation and fraud, secured from Schuyler, Chadwick and Burnheim 300 shares of Interborough stock on the promise of

giving their immediate check in payment of the same, properly certified, for $9,600.00. The effort of the plaintiff in that case was to follow that particular stock, which, upon the evidence, they failed to do, and the Court held they were not entitled to recover.

The case of *Cunningham, Trustee of Ponzi,* v. *Brown,* 265 U. S. 1, is also a case in bankruptcy, and the Court's decision in that case rested upon the construction of Section 60-*b* of the Bankruptcy Act as to preference, and we respectfully submit is not authority for the position taken in this case.

The case of *St. Louis & S. F. Railroad* v. *Spiller,* 274 U. S. 304, was a suit brought by the petitioner to recover from the purchaser under a foreclosure sale the amount of the judgment theretofore recovered against an insolvent railroad company for overcharges in freight and to have this judgment declared a preferential lien and compel its payment by the purchaser at the foreclosure sale. We do not think that this case can be considered as an authority, in fact or in law, for the principle sought to be asserted by the petitioner here.

Without an extended discussion of the facts in these respective cases relied upon by the petitioner, we think that it will clearly appear to the Court that neither of these cases are authority for the position which the petitioner undertakes to adopt.

Upon the contrary, the decisions of this Court are in thorough harmony with the decisions of the Circuit Court of Appeal, and the doctrine announced in *Peters* v. *Bain,* 133 U. S. 670, clearly establishes the right of the plaintiff in this case to recover.

"Formerly, the equitable right of following misapplied money or other property into the hands of parties receiving it, depended upon the ability of identifying it, but equity attaches only to the very property misapplied. This right was first extended to the proceeds of the property, and secondly to that which was procured in place of it by exchange, purchase or sale. But if it became confused with other property of the same kind so as not to be distinguishable without any default on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that the confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass giving to the party injured by the unlawful diversion, a priority of right over the other creditors of the possessor."

This doctrine is announced in *Brennan* v. *Tillinghast*, 201 Federal 609, and is quoted in *Poisson* v. *Williams*, 15 Federal (2) 582, as follows:

"It is undisputed that the proceeds of the sale of Brennan's stock, wrongfully converted by the Ironwood Bank to its own use, constituted a trust fund which did not lose its character when mingled with the other moneys of the Bank, and that Brennan was entitled to recover the amount thereof as a preferred claim if and to the extent that he sustained the burden of proof of tracing this money through in its original shape or in a substituted form into the moneys which came into the hands of the Receiver as part of the assets of the bank, and proof that the *tort feasor* has mingled the trust fund with his own and made payment thereafter out of the common

fund, is, nothing else appearing, of sufficient identification of the remainder of that fund coming into the hands of the Receiver not exceeding the smallest amount the fund contained subsequent to the commingling as trust property, because the legal presumption is that he regarded the law and neither paid out the trust fund nor invested it in other property, but kept it sacred. Proof that the Trustee mingled trust funds with his own and made payment out of the common fund is of sufficient identification of the remainder of that fund coming into the hands of the Receiver not exceeding the smallest amount the fund contained subsequent to the commingling (citing cases) as trust property, because the legal presumption is that he regarded the law and neither paid out nor invested in other property the trust fund, but kept it sacred. *Peters* v. *Bain*, 122 U. S. 670; *Allen* v. *U. S.*, 285 Fed. 678; *Board of Commissioners of Crawford County* v. *Strawn* (C. C. A., 6th), 157 Federal 49; *Board of Commissioners* v. *Patterson*, 149 Fed. 229; *Merchants National Bank* v. *School District* (C. C. A., 9), 94 Federal 705; *Carlson* v. *Kies*, 75 Wash. 171; *State* v. *Foster*, 5 Wy. 199."

It cannot be denied but that the agreement was made by the bank to purchase certain bonds for the plaintiff; that the plaintiff then placed into the funds of the bank the amount of cost of these bonds, to wit, $3,964.60; that this amount was then charged to the account of the plaintiff and placed in an entirely separate fund by the bank, though the proceeds were commingled with its other money, which was not there-

after subject to any check of the plaintiff, but constituted a special deposit for a specific purpose, to wit, the purchase of the bonds specified. This was in accordance with the agreement of the bank, which had received $2,100.00 of his money for this purpose and set aside the specific sum for the purchase of these bonds. The title to this money thereafter was in the plaintiff, and at no time thereafter did the bank have any right to divert this money or to apply it to any other purpose than that particularly specified and agreed upon.

The bank in this transaction was the bailee of a trust fund which belonged to the plaintiff. It has been proven that from that date to the date of the closing of the bank and at the time the receiver took over the institution he received this money from the bank, which in equity and in justice belonged to the plaintiff and should now account to the plaintiff for the same.

II.

There is no serious conflict in the decisions of the several Circuit Courts of Appeals upon this question.

What might appear to be a conflict in the decisions rests upon distinction in the facts of the several cases cited, and these cases cited do not conflict with the decisions of this circuit, and we submit that an examination of these authorities will show that they rest upon entirely different facts, and the general principle upon which the decisions of the Fifth Circuit and the Ninth Circuit rests are supported by these authorities.

III.

This case is not "Dealing with the trust asserted on the ground that the assets of the bank have been augmented by a payment made to it, but is in fact an agreement by the bank that a definite amount of the funds in its possession shall be held in trust for a specific purpose."

And this distinction, so clearly analyzed in the opinion of the Court, differentiates this case from any of the authorities cited by the petitioner.

The Court's attention is particularly called to the statement in the brief of the petitioner, pages 18 and 19, which is wholly out of accord with the facts of this particular case, wherein the petitioner states as the facts of this case:

> "* * * With the understanding that the Bank would purchase approximately $4,000.00 of Liberty Bonds and charge his account for the amount thereof when purchased. In the meantime, the deposit was to stand to his credit for the full amount."

We submit that this statement is not supported by the facts of this case, the facts being as stated in the opinion of the Circuit Court of Appeals, as follows:

> *"The Bank charged his account with the price of the bonds and credited its bond account with the amount charged; in other words, it paid to itself the money necessary for the purchase of the bonds and charged itself with the same as Trustee. As it had in its vaults the funds to carry through the transaction as entered on its books, and as equity regards that as done which*

should have been done, funds to an amount necessary to purchase the bonds must be deemed to have been held in trust for that purpose.''

This case is not a case of shifting credits or bookkeeping entries, but, as a result of the agreement of the bank, a trust was impressed upon its cash to the extent of the amount of the trust fund received by the bank.

If this case rested upon the question of augmentation of the funds of the receiver, then we submit that there could be no question under the evidence of this case but that the $2,100.00 check drawn on the Eastern Bank & Trust Company, for which the First National Bank received and collected the full amount, would certainly be to this extent an augmentation, and the plaintiff would be entitled to recover, under any of the authorities, this amount.

But in this case the First National Bank took the entire amount of $3,964.60 of the moneys of the defendant with the express agreement to use this money for a special purpose, and thereafter the cash funds in the bank never fell below an amount that would be necessary to discharge this trust, and these funds passed into the hands of the receiver and are impressed with the trust to the extent of the amount so specially deposited and held by the bank.

Respectfully submitted,

L. S. MOORE,
Attorney for the Respondent.

MOORE & DUNN,
Of Counsel.

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CHARLES ELMORE CR
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 639

L. J. BLAKEY (SUCCESSOR TO R. E. SCHUMACHER), RECEIVER OF THE FIRST NATIONAL BANK OF NEW BERN, NEW BERN, NORTH CAROLINA, PETITIONER,

vs.

CHARLES J. BRINSON, RESPONDENT.

BRIEF OF THE COMPTROLLER OF THE CURRENCY AS AMICUS CURIÆ.

F. G. AWALT,
GEORGE P. BARSE,
Attorneys for J. W. Pole, Comptroller of the Currency.

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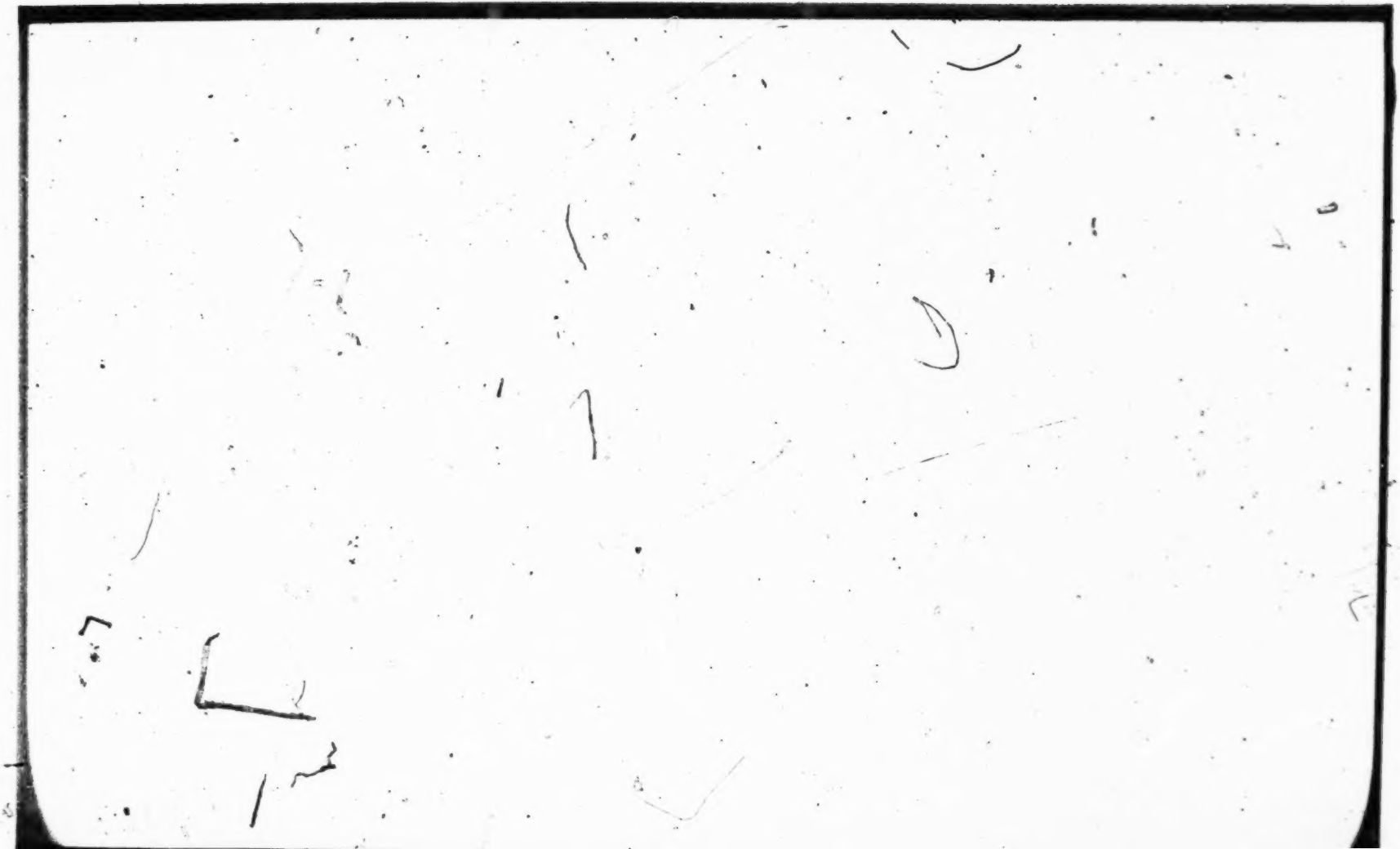

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1931.

No.

L. J. BLAKEY (Successor to R. E. Schumacher), Receiver of the First National Bank of New Bern, New Bern, North Carolina, Petitioner,

vs.

CHARLES J. BRINSON, Respondent.

BRIEF OF THE COMPTROLLER OF THE CURRENCY AS AMICUS CURIÆ.

Comes now J. W. Pole, Comptroller of the Currency of the United States, and, by leave of Court first had and obtained, respectfully submits his brief, as *amicus curiæ*, in support of the petition for writ of certiorari filed by L. J. Blakey, Receiver of the First National Bank of New Bern, New Bern, North Carolina, in the above entitled cause.

I.

Foreword.

Citation of the opinions below, statement concerning the jurisdiction of the Court to issue writ of certiorari, summary of the facts, specification of errors, and argument of the issues involved, have been fully covered in the petition and supporting brief filed by the Receiver

of the First National Bank of New Bern, and therefore reference is here made to the same in the interest of avoiding repetition.

II.

Interest of the Comptroller of the Currency in the Case from an Administrative Standpoint.

The Comptroller of the Currency is charged by law with the liquidation of insolvent national banks (through receivers appointed by him), and with the disbursement of the net proceeds of such liquidation to the creditors of such banks. Before disbursement can be made it is necessary that the creditor, whether general or preferred, establish or prove his claim. An important function of the Comptroller in this respect is to pass upon and allow or reject the claims sought to be established. (Sections 5234, 5235, 5236 U. S. R. S.; U. S. C., ch. 2, Title 12, Sections 192, 193, 194.)

The instant case involves fundamental principles of law concerning the allowance of preferred claims against such banks, and therefore directly affects the administrative functions of the Comptroller with reference to all national banks now in receivership, as well as those which in future may go into receivership.

Obviously it is necessary, in order to avoid discrimination, *that a uniform policy be pursued with reference to the allowance and rejection of preferred claims.* For a period of many years the state of the law, as represented by the Court decisions, has been such as to enable the Comptroller of the Currency to pursue a uniform policy in such matters in all sections of the

country. Such policy has been based upon the decisions of the Circuit Courts of Appeal in the Eighth, Sixth, Ninth, Tenth and Second Circuit (cited and referred to in the Receiver's brief, pages 13-18). Prior to the decision in the instant case in the Fourth Circuit, and prior to the case of *Davis* v. *McNair*, 48 Fed. (2) 494, rendered in the Fifth Circuit (relied upon and followed by the Court below in deciding the instant case), the same policy had been considered to be established, and had been followed, in the Fourth and Fifth Circuits. It was also considered that such policy was in conformity to the principles established by this Court in the cases of *Schuyler* v. *Littlefield*, 232 U. S. 707, 710, 713; *Cunningham, Trustee of Ponzi*, v. *Brown*, 265 U. S. 1, 11; *St. Louis & S. F. R. R.* v. *Spiller*, 274 U. S. 304, 310.

The decision in the instant case (and, incidentally, the decision in the case of *Davis* v. *McNair, supra*) appear to be in direct conflict with the principles of law constituting the basis of the uniform policy heretofore applied in all of the circuits. The result is that until the issues in the instant case are finally settled by a decision of this Honorable Court, there will necessarily be a conflict and inconsistency in the administration of the various receiverships, in that the previous practice will have to be followed *in the districts other than* the Fourth and Fifth Circuits, in deference to decisions controlling in such other districts, and the principles established by the instant case will have to be observed, so far as applicable, in the Fourth and Fifth Circuits.

There are now approximately 800 national banks in receivership liquidation under the supervision of the Comptroller of the Currency throughout the entire country. The national banks in receivership in the Fourth and Fifth Circuits number approximately 200. The speedy relief of depositors and creditors of insolvent banks is now one of the paramount problems of the day. A decision upon the issues of law involved in the instant case, regardless of whether the decision below be affirmed or reversed, will be of inestimable aid to the Comptroller of the Currency in *re-establishing* a uniform policy to govern the treatment of preferred claims, and will unquestionably substantially expedite the liquidation of national bank receiverships by making possible the disposition of numerous other pending suits involving the same issues, and by eliminating future litigation of the same type.

III.

Conclusion.

The Comptroller of the Currency therefore earnestly urges this Honorable Court to entertain the petition for writ of certiorari filed by the Receiver in the instant case.

Respectfully submitted,

F. G. AWALT,
GEORGE P. BARSE,
Attorneys for J. W. Pole,
Comptroller of the Currency.

(1661)

SUPREME COURT OF THE UNITED STATES.

No. 639.—October Term, 1931.

L. J. Blakey (successor to R. E. Schumacher), receiver of the First National Bank of New Bern, New Bern, North Carolina, Petitioner,
vs.
Charles J. Brinson.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[May 16, 1932.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent brought suit against the petitioner, receiver of The First National Bank of New Bern, North Carolina, an insolvent national bank, to recover money alleged to have been paid to the bank upon trust for the purchase, for respondent, of United States bonds. Judgment of the United States District Court for the Eastern District of North Carolina for respondent, was affirmed by the Court of Appeals for the Fourth Circuit. 52 F. (2d) 821. This Court granted certiorari. — U. S. —.

The case was tried to the court without a jury and the facts are not in dispute. Respondent maintained an interest-bearing savings account with the bank, in which his credit balance on October 14, 1929, was $1,961.31. Shortly before that date, respondent had had conversations with an officer of the bank, in the course of which the latter signified the willingness of the bank to purchase $4,000 of United States bonds for respondent. On October 10 he stated to respondent that the bank would send to Richmond for the bonds and asked him to bring to the bank on the 14th such amount, in addition to his credit balance, as would be required to pay for the bonds. On the latter date respondent drew a check for $2,100 upon another bank, which he deposited in his savings account, thus increasing his deposit balance to $4,061.31. On the 15th, the same officer of the bank informed respondent that the bonds had been ordered and on the 19th said to him, "I have your bonds", and handed to him a charge slip which stated: "This is to advise you that we have this day charged your account as follows:

"4,000 Fourth L. L. 4¼% Bonds.....$3,960.00
Acc. Int. ..... .60
Commission 4.00

$3,964.60"

On October 21, the bank charged respondent's savings account on its books with $3,964.60, and credited a like amount as a "deposit" in a "bond account" appearing on its books. The bond account contained only a daily record of credits in the account of checks and deposits and their total, without any reference to respondent or any other customer of the bank. The nature and purpose of the account does not otherwise appear. When the bank closed its doors on October 26, it was discovered that in fact no bonds had been purchased, ordered, or received for the respondent. The only transactions had with respect to respondent or his account were the conversations with the officer of the bank and the entry of the debit and credit items mentioned.

On these facts, the District Court concluded that the bank had received the $3,964.60 in trust for the purpose of purchasing the bonds and that as the funds in the hands of the receiver had been augmented by the wrongful commingling of the trust fund with the other funds of the bank, respondent was entitled to payment in preference to the general creditors of the bank. The Court of Appeals thought that the trust arose only on the 19th, when the bank stated that respondent's account had been charged with the purchase price of the bonds, but reached the same conclusion as respects the increase of the funds in the hands of the receiver and the right of respondent to preferential payment.

The petitioner insists, as matter of law, that no trust ever came into existence as the result of these transactions. He also relies on the facts that the $2,100 check credited to respondent's account had been included in a clearing house settlement of the bank with a correspondent, and its proceeds in the form of a draft for the balance due upon the settlement had been endorsed and turned over by the New Bern bank to a third bank in settlement of its account with the latter. From this it is argued that the check did not augment the bank's funds, and that the proceeds could not be traced into the hands of the receiver; hence, as to them the respondent could not be preferred over general creditors.

As we conclude that petitioner's first position is well taken, it is unnecessary to consider the second. It would have been equally

competent for respondent to have provided for the purchase of the bonds either by the creation of a trust of funds in the hands of the bank, to be used for that purpose, or by establishing with it a credit to be debited with the cost of the bonds when purchased. But only if the former was the method adopted, could respondent, upon the bank's insolvency and failure to purchase the bonds, recover the fund or its proceeds, if traceable, in preference to general creditors, see *Minard* v. *Watts,* 186 Fed. 245; *Fallgatter* v. *Citizens' National Bank,* 11 F. (2d) 383; *Northern Sugar Corp.* v. *Thompson,* 13 F. (2d) 829.

The relationship established between the bank and respondent by his savings account was, from its inception, that of debtor and creditor, and the credit balance of $1,961.31 in respondent's account on October 14 represented the amount of the bank's indebtedness to him. *Planters' Bank* v. *Union Bank,* 16 Wall. 483, 501; *Phoenix Bank* v. *Risley,* 111 U. S. 125; *Manhattan Bank* v. *Blake,* 148 U. S. 412, 425, 426.

Although there had been anticipatory talk of the purchase of bonds, and the bank's officer had stated that they would be purchased, nothing said or done before the 14th purported to carry out the proposal or to alter the relationship established by the savings account. On that date respondent's credit balance was augmented by the deposit of the $2,100 check, made in conformity to the usual course of business with respect to deposit accounts. Respondent obviously did not alter the debit and credit relationship with respect to the $1,961.31 balance by asking the bank to purchase bonds, or by handing to the bank the deposited check of $2,100. All that happened on that date was inconsistent with any purpose to create a trust of the check or its proceeds, and showed unmistakably that the amount of the check, as in the case of any other deposit in the savings account, was to be added to the existing balance and treated like it. In making the deposit, respondent used the customary form of deposit slip and, in accordance with its instructions, the deposit was credited by the bank in the usual manner, both in his passbook and in his savings account on its own books. After the deposit of the check, as before, the bank remained a debtor and the respondent a creditor for the amount of the credit balance.

The situation thus created continued without change until the 19th, when the bank's officer advised respondent that the bonds had been purchased. If the advice was true, as respondent believed

it to be, he was then called upon to pay to the bank the amount of the purchase price, and the bank proceeded, with the assent of the respondent, to liquidate the supposed obligation by charging his savings account with the exact amount of the stated purchase price, with interest and commissions added. We can find in this method of discharging a supposed obligation no hint of an intended alteration of the debtor and creditor relationship, with which respondent had been content from the beginning, to that of trustee and *cestui que trust.*

The court below thought that the legal consequence to be attributed to the debiting of the account with the supposed purchase price of the bonds was the same as if the respondent had cashed a check for the amount and had then proceeded to hand the money back to the bank under a specific agreement between him and the bank that the money was to be held as a special fund, for the sole purpose of completing the purchase. This view is not without support. See *Davis* v. *McNair,* 48 F. (2d) 494; *State* v. *Grills,* 35 R. I. 70, 75; *Northwest Lumber Co.* v. *Scandinavian American Bank,* 130 Wash. 33; *State* v. *American Exchange Bank,* 112 Neb. 834. See, *contra, Beard* v. *Independent District of Pella City,* 88 Fed. 375, 381; *Mark* v. *Westlin,* 48 F. (2d) 609; *First National Bank* v. *Williams,* 15 F. (2d) 585; *Howland* v. *People,* 229 Ill. App. 23; *Miller* v. *Viola State Bank,* 121 Kan. 193; *People* v. *Merchants & Mechanics' Bank of Troy,* 78 N. Y. 269; *Hecker-Jones-Jewell Milling Co.* v. *Cosmopolitan Trust Company,* 242 Mass. 181. Such a procedure, if actually carried out, might afford a basis, which is lacking here, for the inference that respondent, no longer content with the role of creditor, had sought to establish a trust fund. But the mere debiting of his account, without more, for the reimbursement of the bank for the obligation which it was supposed to have incurred or paid, lends no support to such an inference. The cancellation of the credit balance by the debit neither suggests any intention to establish a trust nor points to any identifiable thing which could be the subject of it.

The debit entry may be disregarded, because respondent's assent to it was procured by a false statement; but the only consequence is that his status as a creditor is unaffected and he is entitled only to share in the funds of the bank on an equal footing with other cerditors who similarly are the victims of its insolvency.

Reversed.

END OF CASE